Reply Brief of Appellees.

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In the

Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 625.

THE LOUISVILLE AND NASHVILLE RAILROAD ET AL., Appellants,

vs.

HENRY W. BEHLMER, Appellee.

APPEAL FROM THE CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

MOTION TO VACATE SUPERSEDEAS.

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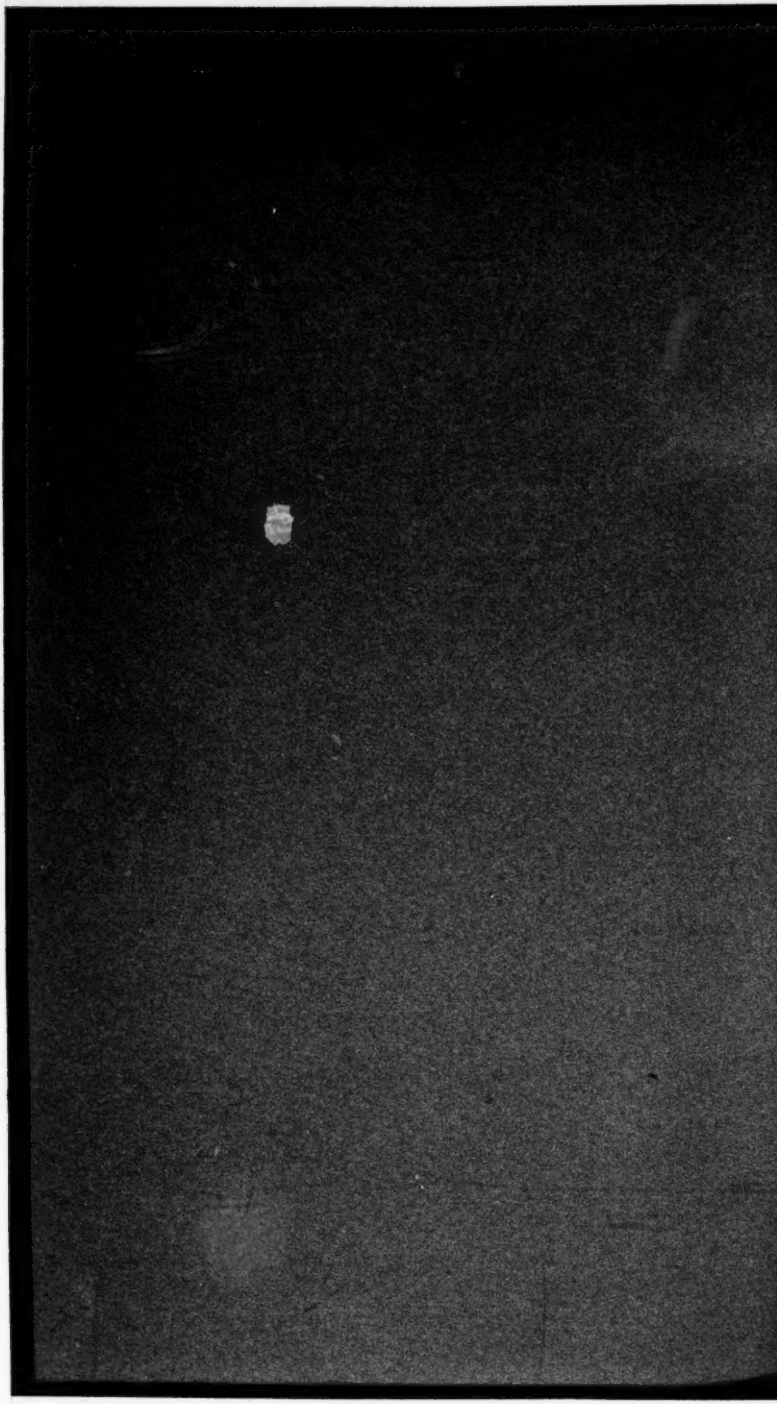

REPLY BRIEF OF APPELLEE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 585.

THE LOUISVILLE AND NASHVILLE RAILROAD ET AL., APPELLANTS,

vs.

HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

MOTION TO VACATE SUPERSEDEAS.

Motion to Vacate the Proper Practice.

While practically conceding that this motion is the correct remedy in the premises, appellants nevertheless argue that resort should be had to the lower courts.

There is nothing in this contention, and it was thought unnecessary by appellee to consume the time of this court with a discussion of the point.

In Keyser *vs.* Farr, 105 U.S., 265, motion was made for a supersedeas by appellants, and by appellees to dismiss. Mr. Chief Justice Waite said, *inter alia:*

"After the acceptance of the bonds for the appeal and the "docketing of the cause in this court, the jurisdiction of the "court below was gone. From that time the suit was cog- "nizable only in this court. In *Goddard vs. Ordway* (101 "U. S., 745) there was nothing more than the formal order "of allowance entered, as in this case, with the final decree. "Such an order while in that condition, it was held, was "subject to the control which every court retains over "its ordinary judgments during the term. In *Draper* "*vs. Davis* (102 U. S., 370), however, it was decided that "after a bond had been accepted by one of the judges in "accordance with such an order of allowance, the jurisdic- "tion was transferred from the court below. Here a bond "was not only accepted, but the case was actually entered "in this court. In this way clearly the court below was de- "prived of power to make its order of November 14. It fol- "lows that the motion to dismiss, so far as it is based upon "the order of the court below vacating its allowance of ap- "peal, must be denied, and that the supersedeas which fol- "lowed in law from the acceptance of the bond by the Chief "Justice is in force. Such was our ruling in *Draper vs.* "*Davis* (*supra*) on a similar motion at the last term."

The facts in this case of Keyser *vs.* Farr were that after the allowance of an appeal the required *supersedeas* bond was duly approved and the case entered here, the court below by a subsequent order, on November 14, vacated that allowance—this was held void, though made during the term at which the order allowing the appeal was entered.

In Draper *vs.* Davis, 102 U. S., 370, Mr. Chief Justice Waite said: "When the original bond of $1,000 was accepted "by the justice and the citation signed, an appeal was allowed "and security taken, which operated as a *supersedeas*. That "transferred the jurisdiction of the suit appealed to this

"court. * * * The power of the justice over the appeal "and the security, in the absence of fraud, was exhausted "when he took the security and signed the citation. From "that time the control of the *supersedeas* as well as the ap- "peal was transferred to this court." * * *

In the case at bar the court below has allowed the appeal, signed the citation, and approved a bond purporting to be a supersedeas bond, and the term has ended, the transcript has been sent up, and the case docketed here.

It is idle, therefore, to assert that relief is not to be sought in this court, which has "control of the *supersedeas* as well as the appeal."

On motions to vacate and grant, this court has frequently construed the statutes allowing a supersedeas. On similar motions it will construe a statute disallowing or forbidding a supersedeas.

In Patterson *vs.* Hoa's Extx., 131 U. S., LXXXVIII, on a motion to vacate a supersedeas, it was decided by Chief Justice Waite that the appeal bond having been filed too late to make the writ operate as a supersedeas, the court vacates an order heretofore granted allowing a writ of *supersedeas* and directs same to be certified to the circuit court for the district of Louisiana.

In Kitchen *vs.* Randolph, 93 U. S., 86, Mr. Chief Justice Waite, on a motion to vacate a supersedeas, enters into an exhaustive discussion of the statutes relating to the subject, and holds that unless the law is strictly complied with, it is not within the power of a justice of this court to allow a supersedeas, and he therefore grants the motion. The questions raised and decided were those of power and jurisdiction under the law and not of mere informality.

In the case of Sage *vs.* Cent. R. R. Co., 93 U. S., 412, there was a motion to vacate, and Mr. Chief Justice Waite says, at p. 416:

"In *Kitchen vs. Randolph, supra*, 86, we held that it was "not within the *power* of a justice of this court to grant a

"supersedeas on a writ of error or upon appeal, unless the "writ of error was sued out and served or the appeal taken "within sixty days, Sundays exclusive, after the rendition "of the judgment or decree complained of." (Italics mine.)

After an elaborate exposition of the law on the subject, he concludes:

"No *supersedeas* can follow from the appeal allowed by "Mr. Justice Miller, because that clearly took effect after "the expiration of the sixty days from the date of the de- "cree. Neither can the order of the same justice have the "effect of the allowance of a *supersedeas* on the original ap- "peal, because, as has already been shown, that appeal was "not taken in time.

"From this it follows that the motion to vacate the super- "sedeas must be granted."

These cases fully establish that this court will go into all the questions on a motion to vacate, and give a construction of the law bearing upon the points involved.

In the case of Draper *vs.* Davis, 102 U. S., the motion was for a supersedeas.

This court again fully discusses the law and the facts and says: "It follows that the supersedeas which resulted from "the taking of the security on the 29th day of June is still "in force and has never been vacated. Consequently, the "court below is without *power* to proceed with the execution "of the decree appealed from, and we will presume that upon "an intimation of that kind from us it will not attempt to "do so." (Italics mine.)

The motion was therefore denied without prejudice to its renewal.

The motion in the case at bar is framed with a view to this court adopting the course taken in Draper *vs.* Davis, 102 U. S., 371, should it think proper to simply declare the law and presume that the court below will need nothing further from this court than an intimation to the effect that it was without power to grant a supersedeas in the face of a statute

forbidding it, and that the "successful party holds his judg-"ment or decree freed and discharged from this means of "staying proceedings for its collection or enforcement. This "is a right which he has acquired and of which he cannot "be deprived without due process of law." (Sage *vs.* R. R., 93 U. S., 417.)

In all these cases and many others the question of power was considered, on a motion to vacate. In the words of Mr. Justice Brewer, 166 U. S., 511, "* * * the question "of power being one of jurisdiction, is always open, and "must whenever presented be considered and determined."

It is clear, then, that this proceeding is proper.

The cases cited by counsel for appellants on this point seem to have no bearing whatever on it. Both *Ex parte* French, 100 U. S., p. 1, and *In re* Haberman, 147 U. S., 525, were petitions for mandamus and were refused.

Intermediate Courts of Appeal.

Without obtaining a supersedeas the decrees of intermediate courts of appeal will go into effect.

Such was the opinion of this court in Draper *vs.* Davis, 102 U. S., 370, on an appeal from the supreme court of the District of Columbia in general term.

In that case this court denied a motion for a supersedeas on the ground that one already existed, but gave leave to renew the motion should it be necessary.

It thus appears that in the opinion of this court a supersedeas is necessary to prevent the enforcement of a decree of the supreme court of the District of Columbia in general term, the same being an intermediate court of appeal.

The same ruling was made by this court in Keyser *vs.* Farr, 105 U. S., 265, in reference to a decree of the supreme court of the District of Columbia.

In the case of Telegraph Co. *vs.* Eyser, 19 Wall., 419, the supreme court of Colorado Territory affirmed the judgment

of the territorial district court on September 6, 1873. A writ of error was sued out to this court and a supersedeas bond given and approved within sixty days. A motion was made "for a supersedeas to the supreme court of Colorado "Territory and the district court in and for the county of "Arapahoe, in that Territory."

This court held that the steps taken operated as a supersedeas and said "The order asked for will be directed to "issue, unless this opinion shall render that procedure un- "necessary." Again we see that in the opinion of this court a supersedeas is necessary to restrain the enforcement of a judgment of an intermediate court of appeals.

In Board of Commissioners *vs.* Gorman, 19 Wall., 662, the judgment of the supreme court of the Territory of Idaho was carried into effect after the expiration of the ten days during which the law forbids execution to issue. A writ of error was allowed to this court and a supersedeas bond approved within sixty days. It was claimed that the judgment was executed "after the allowance of a writ of error to this "court, which operated as a supersedeas." This court held: "The supersedeas under the act of 1872, by filing the bond "within sixty days, stays *further proceedings*, but does not "interfere with what *has already been done.*"

Once more this court announces the doctrine that unless a supersedeas is duly obtained the judgment of an intermediate appellate court will be enforced, and this court will not interfere with what "*has already been done*" prior to the allowance of the supersedeas.

In the case of Foster *vs.* Kansas, 112 U. S., 201, judgment of ouster was rendered by the supreme court of Kansas April 1, 1884. The judge of the district court of Kansas was officially notified on the 7th of April, when the authenticated copy of the record of the supreme court was presented to him. He acted on it immediately by appointing a new county attorney to fill the vacancy caused by the judgment of ouster. Prior to this, on April 5, a writ of

error to this court for the reversal of the judgment of the supreme court of Kansas was allowed in Washington, a supersedeas bond approved, and a citation signed, but these papers did not reach Kansas until April 8, when they were lodged in the office of the clerk of the supreme court of Kansas.

On a rule to punish for contempt it was held by this court that the supersedeas did not operate until the papers were filed in the supreme court of Kansas, on April 8, and this was too late, the judgment of that court having gone into effect on April 7. The rule was discharged.

From these cases it appears conclusively that unless a supersedeas is duly allowed the judgments and decrees of intermediate courts of appeal must go into effect.

Appellants themselves seem to have conclusively admitted this by giving the bond on this appeal purporting to be a supersedeas bond. Had they not regarded it as necessary to suspend the decree of the circuit court of appeals, they would not have done so.

A supersedeas is a statutory remedy, and unless obtained by strict compliance with all required conditions the judgment or decree below must be enforced.

Mr. Baxter, at page 6 of his brief, says: "A supersedeas "is not, strictly speaking, a *statutory* remedy."

This is somewhat surprising from such eminent counsel.

In the words of this court, quoted in appellee's opening brief:

"A supersedeas is a statutory remedy. It is only obtained "by a strict compliance with all the required conditions, "none of which can be dispensed with (Hogan *vs.* Ross, 11 "How., 297; R. R. Co. *vs.* Harris, 7 Wall., 575). Time is an "essential element in the proceeding, and one which neither "the court nor the judges can disregard. If a delay beyond

"the limited time occurs, the right to the remedy is gone, "and the successful party holds his judgment or decree freed "and discharged from this means of staying proceedings for "its collection or enforcement. This is a right which he "has acquired, and of which he cannot be deprived without "due process of law." (Sage *vs.* Cent. R. R., 93 U. S., 417.)

In Kitchen *vs.* Randolph, 93 U. S., 88, Mr. Chief Justice Waite said: "In 1803 appeals were granted in cases of "equity and of admiralty and maritime jurisdiction, and "made 'subject to the same rules, regulations, and restric- "tions as are prescribed in law in case of writs of error' (2 "Stat., 244, sec. 2). It has accordingly been held that an "appeal, to operate as a *supersedeas*, must be perfected and "the security given within ten days after the rendition of "the decree (Adams *vs.* Law, 16 How., 148; Hudgens *vs.* "Kemp, 18 How., 535; French *vs.* Shoemaker, 12 Wall., "100; Bigler *vs.* Walker, *id.*, 149). The allowance of the "appeal is the equivalent of the writ of error."

This court then goes on in the same vein to discuss the act of 1872, increasing the time to sixty days. (R. S, sec. 1000.)

In Saltmarsh *vs.* Tuthill, 12 How., 389, a mistake was made by counsel in bringing the case to this court by appeal instead of by writ of error. The court below, upon discovery of this mistake, attempted to give relief by allowing a supersedeas.

Mr. Chief Justice Taney said:

"The writ of error afterwards sued out has brought the "case regularly before this court; but as it was not sued out "within ten days after the rendition of the judgment, the "writ-of-error bond does not stay the execution under the "act of 1789.

"Nor is there any equitable power in the circuit court to "stay execution upon the ground that a mistake as to the "manner or time of removing the case was committed.

"And it is immaterial in this respect whether it was the "mistake of the party or the court; for this court has never "deemed the tribunals of the United States authorized to "dispense with the express provisions of the acts of Congress "regulating appeals and writs of error upon any equitable "ground. No such power is given to them by law. It was "so decided in this court in United States *vs.* Curry and "others, 6 How., 113, and Hogan and others *vs.* Ross, 11 *id.*, "297."

Chief Justice Taney concludes thus: * * * "We are "satisfied from the facts before us that the circuit court, "without any coercive process, will conform to the opinion "of this court and issue execution when informed of this "decision."

The case of Hovey *vs.* McDonald, 109 U. S., 150, does not conflict with these decisions. Continuing the quotation where Mr. Baxter leaves off, at page 160, we find Mr. Justice Bradley using the following language: "In this country the "matter is usually regulated by statute or rules of court; "and, generally speaking, an appeal, upon giving the se- "curity required by law (when security is required), suspends "further proceedings and operates as a supersedeas of execu- "tion. This, as we have seen, is the case in the circuit courts "of the United States."

He goes on to say that such is the intrinsic force of some decrees that only an affirmative order will suspend their operation—for instance, a decree granting, refusing, or dissolving an injunction—and he cites the Slaughter House cases, 10 Wall., 273, to that effect. This being the case, Hovey *vs.* McDonald, 109 U. S., 150, is a strong authority for appellee, as the decree appealed from in the case at bar grants an injunction, and there is no affirmative order suspending its operation.

It is also a matter of surprise to find Mr. Baxter saying, at page 6 of his Brief: "The provisions of the Judiciary "act of the United States, as set out in the Revised Statutes

" hereinabove quoted, are *statutory regulations* of a right " which existed under the laws and orders of the chancery " court in England upon the adoption of the Constitution " and formation of the Government of the United States of "America."

He evidently overlooked the fact that at page 5 of his brief he quotes the language of this court, as follows: " In " England, until 1772, an appeal from a decree or order in " chancery suspended proceedings; *but since that time a con-* " *trary rule has prevailed there.*" (Italics mine.)

Hovey *vs.* McDonald, 109 U. S., 150–160.

The Constitution was adopted and this Government formed after 1772, when an appeal did not suspend proceedings under the English practice. No change was made in England until 1807. His conclusions as to the Judiciary act of 1789 being "*statutory regulations*" of an existing right are incorrect.

At page 11 of his brief Mr. Baxter says:

" There is no provision in the act of 1891 establishing the circuit court of appeals; that in case of an appeal from the circuit court of appeals to the Supreme Court of the United States, such appeal should not act as a supersedeas."

Neither is there a provision *in hæc verba* that it should, and if appellant's method of reasoning is correct, there is thus a hiatus in the law.

In the absence, then, of a statute allowing it there can be no supersedeas, as the remedy is statutory according to all the decisions of this court.

Appellant bases this contention on the erroneous notion that unless a statute forbids a supersedeas the old chancery practice allowed it. The contrary is true, as we have seen.

The Mandate.

Just what the learned counsel for the South Carolina and Georgia railroad means on this point is not quite clear.

If he takes the position that in cases appealable of right to this court from the circuit court of appeals the mandate of that court cannot go down, but must come only from this court, then he has discovered an effectual means of forever ending suits of this sort. All that need be done in this class of cases where the decree of the appeal court is against a party is for him to neglect to bring the case up to this court, and if the circuit court of appeals is powerless to send down its mandate the case, like Mahomet's coffin, will remain forever suspended.

In the case of The Conqueror, 166 U. S., p. 113, it was decided by this court that a certiorari to the circuit court of appeals could issue after the mandate of that court had gone down, and Mr. Justice Brown said: "We do not think the "party complaining is limited to the six months allowed by "section 11 of the court of appeals act for suing out a writ "of error from the court of appeals to review the judgment "of the district or circuit court, and it would seem that he is, "by analogy, entitled to the year within which by section 6 "an appeal shall be taken or writ of error sued out from "this court to review judgments or decrees of the court of "appeals in cases where the losing party is entitled to such "review."

The act allows one year to appeal to this court from the circuit court of appeals in cases coming here by right. It surely will not be contended that no mandate of that court can go down for a year, awaiting the convenience of the losing party to appeal. This would be a great hardship on the successful litigant. "Justice delayed is justice denied" says Blackstone.

It would seem that the section of the act of 1891 requiring

this court to send its mandate down to the circuit court contemplates that the case has been sent back to the latter within the year allowed for appeal to this court. As this court has frequently decided, the act was passed to procure a speedy settlement of appeals, at that time an impossibility on account of the crowded condition of the docket in this court. It was not passed for the purpose of securing additional delays. The commerce act also requires matters arising under it to be determined "speedily." Celerity is the express object in both these statutes. Neither of them will be so construed by this court as to produce a contrary effect.

The case of The Conqueror, 166 U. S., 113, as we have seen, is authority for the proposition that a certiorari or appeal will be allowed to this court after the mandate of the circuit court of appeals has gone down. The converse of this must also be true, namely, that the mandate of the circuit court of appeals may go down after the allowance of an appeal or certiorari to this court, when there is no supersedeas.

The Judgment Reviewed Here is that of the Circuit Court of Appeals.

It is hard to follow the learned counsel for the South Carolina and Georgia railroad through the somewhat involved course of reasoning by which he arrives at the conclusion that "from the allowance of an appeal by the circuit "court until the case is disposed of here there is only one "appeal, and that appeal is equivalent to and in place of "the appeal 'to the Supreme Court' allowed by the Inter-"state Commerce act prior to the reorganization of the judi-"ciary system under the act of 1891" (Appellants' Brief, p. 9), and that "the intermediate court is for all purposes affecting "the final judgment non-existent when the case properly "reaches this court." (Appellants' Brief, p. 10.)

This contention can scarcely be made seriously by appel-

lants, for if this is to be regarded as an appeal from the circuit court, it must be dismissed.

I. C. Com. *vs.* A., T. & S. F. R. Co., 149 U. S., 149.
Webster *vs.* Daly, 163 U. S., 155.

Having come to this conclusion, counsel also takes the opposite position, that appeals from the circuit courts must not be confused with appeals from the circuit courts of appeals, as they are distinct and different (p. 14, Appellants' Brief). In this he is correct, for this court has said: "It is "true that our decision necessarily reviews the decree of "the circuit court in reviewing the action of the court of "appeals upon it, and, under the statute, our mandate goes "to the circuit court directly, but it is, notwithstanding, "the judgment of the circuit court of appeals that we are "called on primarily to revise." (Union Pac. R'y Co. *vs.* Chicago, &c., R'y Co., 163 U. S., p. 593.)

Appellee fails to see and regards it as unnecessary to discuss the alleged inconsistencies pointed out by counsel that would arise in certain contingencies not now existing or before this court.

Appellee's position is simply that in all cases under the commerce act the decree of the court of appeals must be carried out. No inconsistencies can thus arise. If the court below be reversed it will obey the court above, pending appeal to this court. If the appeal court affirms the court below the same result follows.

The appeal to the Supreme Court being from the judgment of the circuit court of appeals, and that being the judgment reviewed here (163 U. S., 593, *supra*), that is the judgment from which no supersedeas is allowed, for, adopting the narrow construction urged by appellants, it is on the "appeal to the Supreme Court of the United States" that a supersedeas is forbidden. The words of the statute are "*such appeal* shall not operate to stay or supersede the order of the court," "such appeal" being that brought to this court.

Appellee declines to believe that this court will hold an appeal to the circuit court of appeal a mere idle ceremony by which nothing is accomplished, and that its decisions are to be wholly ignored as if they were " non-existent."

Section 16 of the Commerce Act Not Repealed.

We think this has already been amply proved in appellee's opening brief, and counsel for the South Carolina and Georgia railroad practically admits it.

As to the case of U. S. *vs.* Rider, 163 U. S., 132, cited by Mr. Baxter, Mr. Chief Justice Fuller nowhere in the opinion states that the Judiciary act of 1891 repeals any laws not inconsistent with its scheme. On the contrary, he holds that review by certificate of division is abolished because " it is wholly inconsistent with the object of the act of " March 3, 1891, which was to relieve this court and to dis- " tribute between it and the circuit courts of appeal sub- " stantially the entire appellate jurisdiction over the circuit " courts of the United States. McLish *vs.* Roff; Lau Ow " Bow's case, 144 U. S., 47; Construction Co. *vs.* Railway " Co., 148 U. S., 372."

U. S. *vs.* Rider, 163 U. S., p. 139.

Mr. Baxter does not point out a single feature in which the provision in section 16 of the Commerce act forbidding a supersedeas is inconsistent with the Judiciary act of 1891. He does not even attempt to do so.

He simply says that because review by certificate of division has been repealed by the act of 1891 a clause in the Commerce act on a totally different subject was thereby repealed. This is hardly good logic.

Because this court held the income tax unconstitutional it by no means follows that a provision of the Commerce act forbidding a supersedeas has been annulled.

The income tax is a subject quite as pertinent to the ques-

tion under discussion as certificates of division. Moreover, sections 1000 and 1007, Revised Statutes, do not and never have applied to cases under the Commerce act. There always have been certain classes of cases exempt from the operation of these sections, and it is no new principle to except others, which the Commerce act did.

Doyle *vs.* Wisconsin, 94 U. S., 50.
Hovey *vs.* McDonald, 109 U. S., 150.

Granting, therefore, but for the sake of argument merely, that section 16 of the Commerce act is repealed, there is thus no statute allowing a supersedeas in cases arising under the Commerce act; hence none can exist, the remedy being purely statutory. It is familiar law that the abrogation of a later statute does not revive an older.

Section 16 of the Commerce Act Liberally Construed.

The act is remedial and for that reason to be liberally construed.

Wilkinson *vs.* Leland, 2 Pet., 627; Silver *vs.* Ladd, 7 Wall., 219; Beaston *vs.* Farmers' Bank, 12 Pet., 102; U. S. *vs.* Bank of North Carolina, 6 Pet., 29; Bank of U. S. *vs.* Lee, 13 Pet., 107.

We have already seen that Mr. Baxter is incorrect in saying that the provision forbidding a supersedeas is in derogation of the laws and practice of the chancery court of England at the time of the adoption of the Constitution and the formation of the Government of the United States of America (page 8 of his Brief). On the contrary, the practice of that court at that time was to enforce decrees below pending appeal.

Hovey *vs.* McDonald, 109 U. S., 150–160.

The reverse of his proposition is therefore true, and acts allowing a supersedeas being in derogation of the common

law must be strictly construed. This court has invariably done so.

Section 16 of the Commerce Act Applies to Circuit Courts of Appeal on Appeal Conclusively Decided in Three Cases by this Court.

Appellee's opening brief was made to show that the act of 1891 expressly adopted the provision of the Commerce act forbidding a supersedeas and made it applicable "in respect of circuit courts of appeal." Appellant's main contention, variously expressed and put in many different ways, but invariably amounting to the same thing, is this—that the clause in question only applies to the circuit court and does not apply to the circuit court of appeals.

This court, however, has distinctly held in three cases that section 16 of the Commerce act applies to and governs the circuit court of appeals. It is true that throughout the section there is much repetition of the phrase "such court" and "said court," referring to the circuit court. It is true the circuit court of appeals is not specifically mentioned at all, which is not strange, as it did not exist at the time of the passage of the Commerce act.

Nevertheless, in construing this section since the Judiciary Act this court has refused to give it any far-fetched and fantastic meaning, but has interpreted the law so as to make both acts effective in a sensible manner. It has not held that "such court" and "said court" meant wholly and solely the circuit court, and confined the operation of the section to that court alone. On the contrary, it has determined that whatever powers were given to the circuit court on the equity side under this section were also given to the circuit courts of appeal on appeal, and whatever restrictions the section placed upon circuit courts were also placed upon circuit courts of appeal.

The three cases in which this has been decided are the

"Social Circle case," "The Import case," and "The Troy case."

They are all reviewed and affirmed in the latter case, reported as Interstate Commerce Commission *vs.* Alabama Midland Railway (168 U. S., pp. 174, 175), where this court says: "The first contention we encounter, upon this branch "of the case, is that the circuit court had no jurisdiction to "review the judgment of the Commission upon this ques- "tion of fact; that the court is only authorized to inquire "whether or not the Commission has misconstrued the stat- "ute and thereby exceeded its power; that there is no gen- "eral jurisdiction to take evidence upon the merits of the "original controversy; and, especially, that questions under "the third section are questions of fact and not of power, "and hence unreviewable.

"*We think this contention is sufficiently answered by simply "referring to those portions of the act which provide that when "the court is invoked by the Commission to enforce its lawful "orders or requirements, the court shall proceed as a court of "equity to hear and determine the matter and in such manner "as to do justice in the premises.*

"In the case of Cincinnati, N. O. and Texas Pacific R. W. "Co. *vs.* I. C. Com. (162 U. S., 184) the findings of the Com- "mission were overruled by the circuit court after addi- "tional evidence taken in the court, and the decision of the "circuit court was reviewed in the light of the evidence and "reversed by the circuit court of appeals, and this court, in "reference to the argument that the Commission had not "given due weight to the facts that tended to show that the "circumstances and conditions were so dissimilar as to jus- "tify the rates charged, held that as the question was one "of fact, peculiarly within the province of the Commission, "and as its conclusions had been accepted and approved "by the circuit court of appeals, and as this court "found nothing in the record that made it our duty to "draw a different conclusion, the decree of the circuit court

" of appeals should be affirmed. Such a holding clearly " implies that there was power in the courts below to con- " sider and apply the evidence and in this court to review " their decisions.

" So, in the case of Texas and Pacific Railway Company " *vs.* Interstate Com. Com. (162 U. S., 197), the decision of " the circuit court of appeals, which affirmed the validity of " the order of the Commission upon the ground that, even " if ocean competition should be regarded as creating a dis- " similar condition, yet that, in the case under consideration, " the disparity in rates was too great to be justified by that " condition, was reversed by this court, not because the cir- " cuit court had no jurisdiction to consider the evidence " and thereupon to affirm the validity of the order of the " Commission, but because that issue was not actually " before the court, and no testimony had been adduced " by either party on such an issue; and it was said that " the language of the act authorizing the court to hear and " determine the matter as a case of equity ' necessarily im- " plies that the court is not concluded by the findings or con- " clusions of the Commission.'

"Accordingly, our conclusion is that it was competent in " the present case for the circuit court, in dealing with the " issues raised by the petition of the Commission and the " answers thereto, and for *the circuit court of appeals on ap-* " *peal*, to determine the case upon a consideration of the " allegations of the parties and of the evidence adduced in " their support, giving effect, however, to the findings of " fact in the report of the Commission as *prima facie* evi- " dence of the matters therein stated.

" It has been uniformly held by the several circuit courts " *and the circuit courts of appeal* in such cases that *they* are not " restricted to the evidence adduced before the Commission " nor to a consideration merely of the power of the Commis- " sion to make the particular order under question, but that " additional evidence may be put in by either party, and

"that the duty of the court is to decide, as a court of equity, "upon the entire body of evidence." (Italics mine.)

This conclusively establishes that the words "said court" apply equally to the circuit court and the circuit court of appeals. The clause of section 16, under consideration in the Alabama Midland case, was "said court shall proceed to hear and determine the matter speedily as a court of equity." What court? Appellants would say the circuit court, and no other. Not so, answers the Supreme Court of the United States. No such narrow construction is to be put upon the statute. It is not to be so "cribbed, cabined, and confined." The power to determine the case is not only given to the circuit court, but to "*the circuit court of appeals on appeal.*" Such is the distinct language of the decisions.

This being the construction placed upon the section by the highest and final authority, it is idle for appellants to urge that the portion of section 16 forbidding a supersedeas applies only to the circuit court.

It is equally idle to contend that if the refusal of a supersedeas depended on conditions, which is not true, those conditions could not be fulfilled by the circuit court of appeals as well as the circuit court.

The appeal under this clause is given to "either party," and a supersedeas is equally refused to both, unconditionally.

However, the circuit court of appeals can fulfil all conditions. For instance, the circuit court of appeals is just as capable of declaring the order of the Commission lawful and requiring its enforcement as is the circuit court itself. So an appeal from the court of appeals is fully as sufficient as an appeal from the circuit court.

The words "said court" in the statute are used to designate the circuit court and the circuit court of appeals interchangeably. Both courts come within the ambit of the act, according to the express language of this court in the

Alabama Midland case. The motion should therefore be granted.

Appellants' contention that the motion should be refused because the circuit court or "said court," as they insist, dismissed the bill, and because the appeal is not from the circuit court or "said court," is mere quibbling, and should be disregarded.

Using the same style of reasoning, appellee might insist that, as the appeal is "to the Supreme Court of the United States," the motion must be allowed, as that is the exact language of the act.

It is respectfully urged that no such methods should be applied in construing laws passed for practical purposes, but that broad and sound principles should prevail.

It is, of course, forbidden to consider equitable grounds in matters concerning a supersedeas. In view of appellants injecting this element, appellee may be pardoned, however, for stating that the circuit court of appeals, after elaborate arguments on both sides, held this case under consideration for eighteen months, and the decision is the result of most careful thought. An abuse is adjudged to exist in exacting unjust rates from the public by carriers in contravention of the commerce act, passed to put a stop to such grievous wrongs as speedily as possible. The object of the act should be aided, in preventing the continuance of an adjudged evil at the earliest possible moment. Counsel for the South Carolina and Georgia railroad is mistaken about the Alabama Midland case. It does not, when correctly read, overrule the case at bar. On the contrary, it sustains the present case, and the circuit court of appeals refused a rehearing, notwithstanding a petition therefor based principally on the decision of this court in the Alabama Midland case. (See Exhibit A, pp. 3, 24, 25.)

Respectfully submitted.

CLAUDIAN B. NORTHROP,
Solicitor for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 244.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL., APPELLANTS,

vs.

HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

STATEMENT OF THE CASE.

On the 27th day of June, 1894, the Interstate Commerce Commission entered an order requiring the appellants to cease and desist on or before the 15th day of July, 1894, and thenceforth abstain from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by and under the circumstances and conditions similar to those appearing in this case from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and such other commodities for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina. Such order was entered as the result of the hearing of the petition that had been theretofore, December 29, 1892, filed before such commission by the appellee, Henry W. Behlmer. In this complaint so filed he

alleged, in behalf of himself and other merchants and residents of Summerville, that the defendants were charging an unreasonable and excessive rate of 28 cents per 100 pounds on hay in car-load lots from Memphis to Summerville; that Summerville is an incorporated town of considerable size and importance, situated on the South Carolina railway, in the State of South Carolina, and twenty-two miles inland from the city of Charleston, and that said rate of 28 cents per 100 pounds is 9 cents per 100 pounds greater than the defendants charge and receive for transporting hay in car-loads from Memphis through Summerville to Charleston, and that such greater charge constituted a violation of the long and short haul clause of the interstate commerce act; that said rate of 28 cents to Summerville was equal to the rate of 19 cents in force on hay in car-loads from Memphis through Summerville to Charleston, with the local rate of 9 cents per 100 pounds charged over the South Carolina railway for carrying hay from Charleston back to Summerville, and that the 9-cent local rate which the complainant was forced to pay in addition to the through Charleston rate in order to get hay transported from Memphis to Summerville was unreasonable and excessive; that the petitioner carried on a wholesale hay and grain business in said town of Summerville and was thus 22 miles nearer than Charleston to the western points where grain shipments originated; that the petitioner received at Summerville two car-loads of hay ordered by him and shipped to him from Memphis, Tennessee, which hay was so transported to him from Memphis to Chattanooga, 310 miles, by and over the lines of the Memphis and Charleston R. R.; thence to Atlanta, Georgia, 152 miles, by the lines of the East Tennessee, Virginia and Georgia R. R.; thence to Augusta, Georgia, 171 miles, over the lines of the Georgia R. R.; thence to Summerville, 115 miles, over the lines of the South Carolina Railway Co.; that the defendants were common carriers under a common control and management for continuous carriage or shipment or were engaged in the transportation of passengers and property wholly by railroad between the points mentioned; also that the two car-loads of hay referred to were hauled from Memphis to Summerville over the same line, in the same direction as Charleston, and under substantially similar circumstances and conditions as was the Charleston traffic; that the haul from Memphis to Summerville was 22 miles shorter than the haul from Memphis to Charleston, and that such shorter distance was included in the longer distance; that the petitioner was forced to pay 28 cents per 100 pounds on said shipment to Summerville, the shorter distance, when the rate to Charleston, the longer distance,

was 19 cents per 100 pounds; that the petitioner was thereby obliged to pay $56 in the aggregate as freight on the two car-loads of hay from Memphis to Summerville, when the same shipment would have been made by the same roads, over the same rails, in the same direction, to Charleston, a greater distance of 22 miles, for a less sum, to wit, $38 in the aggregate. The petitioner further alleged that the local rate of 9 cents per 100 pounds for 22 miles, as also the aggregate charge of 28 cents per 100 pounds, from Memphis to Summerville, was excessive and unreasonable, and therefore in violation of the act to regulate commerce. It was further alleged by the petitioner that all of the railway lines mentioned in the petition and made defendants in said proceedings were members of the Southern Railway and Steamship Association, and that the discrimination and excessive rates against Summerville existed not only on hay, but on all other articles of interstate commerce coming to that place, greatly to the detriment and disadvantage of that town and to the business of its merchants. The petitioner prayed that the notice required in such cases issue to said railroad, and that the Interstate Commerce Commission would order that the defendants cease from violations of the law in the particulars mentioned, and for such other and further relief as the commission might think proper.

The notice issued and the defendants duly appeared and filed their answers. The joint answer of the receivers of the East Tennessee, Virginia and Georgia Railway Co. and of the Memphis and Charleston R. R. Co. admits that such companies are subject to the act to regulate commerce, and in effect that the shipment of hay took place as set forth in the petition, but it was not admitted therein that the rates specified constituted a violation of the law, and proof of the same was demanded. The answer of the lessees of the Georgia R. R., as also the answer of the receivers of the South Carolina Railway Co., are in substance the same. Concerning the petitioner's allegations of a violation of the fourth section of the interstate commerce act, the answers make the following averments, in substance: That the Georgia R. R. Co. and the other carriers complained against have no joint through tariff from Memphis to Summerville, and that, therefore, they have no "line," in the sense of said section, from Memphis to Summerville on which that section can operate; that the transportation of the two car-loads of hay from Memphis to Summerville was not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, for the reason that Summerville is a local station on the

South Carolina railway, not on any water route, and that enterprise and capital has not constructed more than one railroad to it; that consequently it has not the advantage of competition of carriers, as the said railroad on which it is located is not compelled by competition to choose between a reasonable rate and a rate which is much below what is reasonable, and that at Charleston there exists competition with numerous other all-rail routes between Memphis and that city, eight of which are mentioned by name, and the lines composing the same set forth in detail. The claim was made by the defendants in their answers that all such lines were actual competitors for business from Memphis to Charleston; that Charleston was a port on the Atlantic coast, easy of access for vessels from Baltimore, Philadelphia, New York, Boston, and other eastern ports from which hay is shipped by water; that if the railroads running from Memphis to Charleston charged rates to all places as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be shipped from Memphis to Charleston, but the latter city would be supplied with hay from the North Atlantic ports, and said railroads would not only be deprived of such business, but that Memphis would lose the hay market; that the rates on western produce to Charleston and other coast cities are made with a view to actual existing water competition; that western produce, such as grain and hay, can be shipped from Chicago to Charleston, through the ports of New York, Philadelphia, or Baltimore, over continuous water routes by the lakes and canal or over combined rail and water routes; that the all-rail lines seeking to do business between Chicago, Charleston, and the coast cities are compelled to make their rates approximate those offered by the continuous water route or the combined rail and water routes; that the all-rail routes make their rates as much higher as the difference in services will permit, and those rates are correspondingly adjusted from all western points such as Evansville, Cairo, St. Louis, and Memphis, the present all-rail rates on hay per 100 pounds being as follows: From Chicago, 33 cents; from St. Louis, 28 cents; from Louisville, Evansville, and Cairo, 23 cents; from Memphis, 19 cents. The defendants claimed, therefore, that the rate from Memphis to Charleston on hay was forced upon their lines by actual existing water competition as well as by other additional competition beyond their control; that the controlling element in the said competition is the lake, canal, and ocean transportation between Chicago and Charleston, or the lake transportation from Chicago to Buffalo or other lake ports, thence by rail to New York, and thence by ocean to Charleston, or rail transportation from

Chicago to Baltimore, Philadelphia, or New York, and thence by ocean to Charleston.

The case being at issue upon the complaint and answers, the testimony having been duly taken, the same was, after argument by counsel, duly submitted to the commission, which directed the order to the appellees hereinbefore referred to, and, as required by law, it caused a properly authenticated copy of its report and of its findings of fact and conclusions thereon, together with a copy of said order, to be delivered to each and all of the parties to said cause, their receivers and successors in operation.

The defendants to said proceeding before the Interstate Commerce Commission having failed and refused to obey such order, the said Henry W. Behlmer filed his petition, as he was authorized by the interstate commerce law to do, in the circuit court of the United States for the district of South Carolina, in which the action had before the commission was fully set out and the refusal of the defendants therein to comply with what he charged to be the lawful order of the commission was alleged, and the prayer was made that an order be entered granting to the petitioner a writ of injunction restraining the defendants, their officers, servants, and attorneys, from continuing in their violation and disobedience to said order of the Interstate Commerce Commission, and that finally an order and decree be issued restraining the said defendants and each of them and their officers, servants, and attorneys from further violating or disobeying the requirements of said order of the commission and decreeing permanent obedience to the same, together with such further and additional orders as are usually entered under such circumstances.

The circuit court below, on the 2d day of November, 1894, directed that the defendants appear and answer said petition and show cause, if any they could, why the prayer of the same should not be granted.

The case was duly matured and came on to be finally heard on the 11th day of December, 1895, when after argument the court took the same under advisement, and afterwards, on the 22d day of January, 1896, entered a decree dismissing the bill. From this decree the petitioner appealed to the circuit court of appeals for the fourth circuit.

After hearing and full deliberation the court of appeals reversed the circuit court and entered a decree in accordance with the prayer of the bill on November 6, 1897.

On November 10, 1897, a petition for rehearing was filed by the railroads, and the same was refused January 20, 1898 (Trans., 154). The railroads then appealed to this court.

ASSIGNMENTS OF ERROR.

I.

That said circuit court of appeals erred in reversing and remanding the decree rendered in the above-entitled cause on January 22, 1896, by the circuit court of the United States for the district of South Carolina.

II.

That said circuit court of appeals erred in instructing said circuit court to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them under circumstances and conditions similar to those set out in the petition filed in this cause from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities respectively for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect and enforced as provided for in said act to regulate commerce, and to further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may under the circumstances of this case think proper and just.

III.

That said circuit court of appeals erred in decreeing that said appellees should pay the costs of said cause in said circuit court of appeals.

IV.

That said circuit court of appeals erred in not affirming said decree rendered in said cause January 22, 1896, by said circuit court of the United States for the district of South Carolina.

V.

That said circuit court of appeals erred because it failed to adjudge and decree that the matters of equity alleged in

the bill filed in the above-entitled cause are fully denied in the answer and are not sustained by the proof, and that said bill be dismissed.

VI.

That said circuit court of appeals erred because it in effect decided that the rates charged by the above-named appellees for the transportation of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, South Carolina, are unjust and unreasonable.

VII.

That said circuit court of appeals erred because it in effect decided that the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tennessee, to Summerville, South Carolina, is a like and contemporaneous service under substantially similar circumstances and conditions with the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tennessee, to Charleston, South Carolina.

VIII.

That said circuit court of appeals erred because it in effect decided that as the above-named appellees make a greater charge in the aggregate on hay and other commodities carried by them from Memphis, Tennessee, to Summerville, South Carolina, than they make on such freight from Memphis, Tennessee, to Charleston, South Carolina, they thereby give to Charleston, South Carolina, and its traffic an undue or unreasonable preference or advantage and subject Summerville, South Carolina, and its traffic to an undue or unreasonable prejudice or disadvantage.

IX.

That said circuit court of appeals erred because it in effect decided that the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, South Carolina, is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Charleston, South Carolina.

X.

That said circuit court of appeals erred because it in effect decided that the Interstate Commerce Commission has the power to fix the rates of transportation to be charged by the above-mentioned appellees for carrying freight from Memphis, Tennessee, to Summerville, South Carolina.

XI.

That the said circuit court of appeals erred in directing that a counsel fee should be paid to the counsel of appellant in said court, and in not deciding that the act known as the interstate commerce act, in so far as it directs the payment of a counsel fee to the successful party complaining against railroad corporations engaged as carriers of interstate commerce, while it provides for no similar counsel fee to such railroad companies in case judgment be in their favor, is unconstitutional and void, inasmuch as it deprives such railroad companies of their property without due process of law.

XII.

That said circuit court of appeals erred in not sustaining the decree of the circuit court dismissing the petition of appellant as against The South Carolina and Georgia Railroad Company, appellee, on the ground that the said company was not served with the order of the commission requiring said company to desist from charging any greater compensation in the aggregate for transportation of hay or other commodities from Memphis to Summerville than that contemporaneously charged and received from Memphis to Charleston.

XIII.

That the said circuit court of appeals erred in deciding that there was any proof whatever of the service of a copy of the order of the Interstate Commerce Commission made in said cause upon the appellee The South Carolina and Georgia Railroad Company, and in not deciding that it was beyond the power of the circuit court, after dismissing the petition of appellant, to alter, correct, or amend said decree after the term had expired in which the decree dismissing said petition was filed.

No. Docket. 46

Brief of Northrop for Appellee.

BRIEF FOR APPELLEE.

Filed April 1, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 244.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL., APPELLANTS,

vs.

HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF

CLAUDIAN B. NORTHROP,
Solicitor for Appellee.

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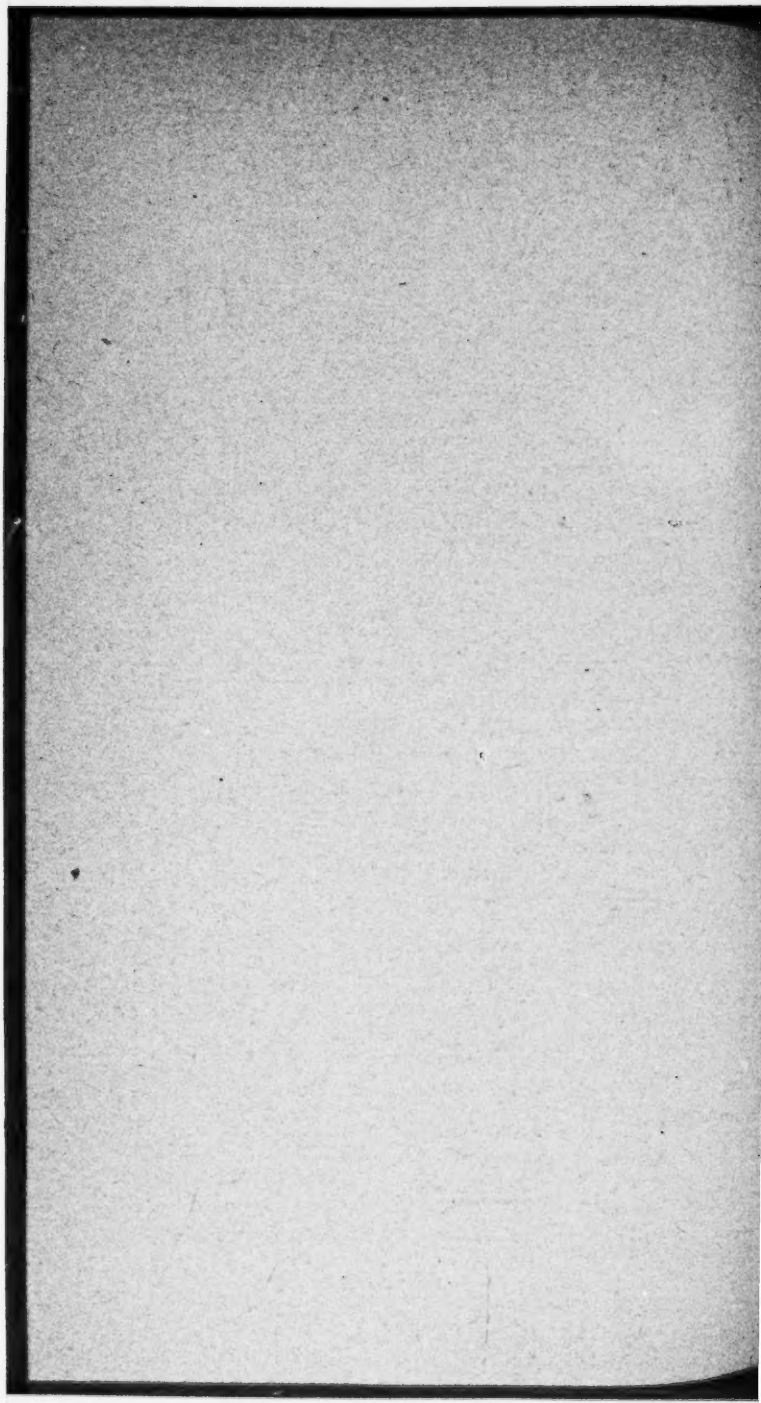

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ERRATA.

On page 50 the sentence, "We now come to the question of carriers subject to the act," should be on page 51, immediately preceding the head line.

On page 31 a typographical error has misplaced the word "law."

XIV.

That said circuit court of appeals erred in reversing the decree of the circuit court which found that the appellee The South Carolina and Georgia Railroad Company was not bound by the proceedings before the Interstate Commerce Commission brought against D. H. Chamberlain, receiver of the South Carolina Railroad Company, unless proof was made of the service upon said appellant of a copy of the order of said Interstate Commerce Commission, and in deciding that the purchase at a foreclosure sale of the property of the South Carolina Railway Company by a committee of its mortgage bondholders, and the conveyance of said property to a new corporation, the South Carolina and Georgia Railroad Company, was a mere change of name.

ARGUMENT.

Stripped of formal phraseology, the foregoing assignments allege error in the rulings of the circuit court of appeals:

1. Because as matter of fact it found the long haul and the short haul in this case to have been made under substantially similar circumstances and conditions.

2. Because as matter of fact it held the rates complained of to be unreasonable.

3. Because as matter of fact it held that the rates in question are unduly prejudicial to Summerville and unduly preferential to Charleston.

4. Because it is alleged that said court in effect held that he commission has power to fix rates.

5. Because the successor to a receiver was held to be bound by proceedings before the commission to which he was a party.

6. Because a fee was ordered to be paid to the solicitor of appellee.

The questions thus raised will be discussed in the above order.

Taking up the first, therefore, as to the substantial similarity of the circumstances surrounding the hauls in this case, it is apparent that an infraction of the fourth section of the act to regulate commerce is involved.

In the last case decided by this court, *The Interstate Commerce Commission vs. The Alabama Midland Railway Co. et al.*, 168 U. S., p. 170, this court said:

"As the third section of the act, which forbids the making "or giving any undue or unreasonable preference or advan-

"tage to any particular person or locality, does not define "what, under that section, shall constitute a preference or "advantage to be undue or unreasonable, and as the fourth "section, which forbids the charging or receiving greater "compensation in the aggregate for the transportation of like "kinds of property for a shorter than for a longer distance "over the same line, under substantially similar circum- "stances and conditions, does not define or describe in what "the similarity or dissimilarity of circumstances and con- "ditions shall consist, it cannot be doubted that whether, "in particular instances, there has been an undue or "unreasonable prejudice or preference, or whether the cir- "cumstances and conditions of the carriage have been sub- "stantially similar or otherwise, are questions of fact "depending on the matters proved in each case (*Denaby Main Colliery Company vs. Manchester Railway Co.*, 3 *R'y & Can. Traffic Cases*, 426; *Phipps vs. London & North Western R'y*, 1892, 2 *Q. B. D.* 229; *Cin., N. O. & Tex. Pac. R. vs. Interstate Com. Com.*, 162 *U. S.*, 184, 194; *Texas and Pacific Railway vs. Interstate Com. Com.*, 162 *U. S*, 197–235)."

It is conclusively settled, therefore, that each case must turn upon its own circumstances, and it is purely a question of fact as to whether or not the circumstances involved in any particular case are substantially similar or dissimilar.

How this question of fact should be determined was also conclusively settled in the same case.

After reviewing all the previous cases this court says:

"Accordingly our conclusion is that it was competent, in "the present case, for the circuit court, in dealing with the "issues raised by the petition of the commission and the "answers thereto, and for the circuit court of appeals on "appeal, to determine the case upon a consideration of the "allegations of the parties and of the evidence adduced in "their support, giving effect, however, to the findings of fact "in the report of the commission as *prima facie* evidence of "the matters therein stated.

"It has been uniformly held by the several circuit courts "and the circuit courts of appeal, in such cases, that they "are not restricted to the evidence adduced before the com- "mission, nor to a consideration merely of the power of the "commission to make the particular order under question, "but that additional evidence may be put in by either party, "and that *the duty of the court is to decide, as a court of equity, "upon the entire body of the evidence*" (I. C. C. *vs.* Alabama Midland R'y Co., 168 U. S., p. 175). (*Italics* mine.)

In the case at bar the circuit court of appeals has performed its full duty and decided this fact as to the similarity

of the circumstances upon the entire body of the evidence. A brief review of the proceedings below shows this.

The contention of the roads was the usual one, namely, that competition made the circumstances dissimilar. It was argued on their part that competition by water and competition by other rail lines and competition of other markets, all of which reduced themselves to the mere fact of competition, constituted and made out substantially dissimilar circumstances and conditions within the meaning of the act to regulate commerce, and the evidence was fully reviewed by counsel for the roads.

On behalf of Behlmer it was said:

The inquiry presented now is, does competition constitute substantially dissimilar circumstances and conditions?

The only answer to this is that it depends upon circumstances. This reply seems neither very wise nor very deep but it is very true.

It depends on what is meant by competition, or the kind of competition, or the force of competition, no matter what the kind may be, if that method of stating it be preferred.

Let us illustrate. Suppose that instead of being unsuccessful, the effort to show a line of ships plying from Charleston down the Atlantic across the Gulf and up the Mississippi to Memphis had prevailed.

These vessels could not compete with the rail lines in carrying strawberries to Memphis from the Charleston truck farms. No strawberries could go by water; they would perish *en route*. So as to freight like strawberries, there could be no water competition between Charleston and Memphis, and the railroads could fix their own rates on this article of commerce.

But on phosphate rock the vessels could make rates, and if they sailed regularly and often there would be forcible competition on this article. But if one steamer a month or one only every two months sailed, the competition would not be of sufficient force to have an effect on the rail lines.

A good illustration of this is seen in the traffic between Chicago and New York city. When the lakes are open the rail rates go down, but for six months in the year, when ice stops navigation, the rail rates go up. Wagon or stage competition to Memphis would be equally inefficient against railroads, for, as said by the Supreme Court, "the demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation" * * * (162 U. S., 210).

So when we go to the law for the rule we find it laid down with clearness and precision and in accordance with reason and common sense.

The Supreme Court does not say that competition regardless of its character or extent, is to be considered in construing the circumstance phrase; it very tersely and accurately says, "Competition that affects rates should be considered" (see Import Rate case, 162 U. S., 233), and in the Phipps case Wills, J., uses an accurate expression and not loose language. He says: "Although *effective* competition with another railway or canal company will not of itself justify a preference which is otherwise quite beyond the mark, yet still it is not a circumstance that can be thrown out of the question, and I think there is abundance of authority for that" (Phipps *vs.* London & Northwestern Railway, 2 Q. B. D., 1892, 229). (Italics mine.) This language is quoted by the Supreme Court in the Import Rate case (162 U. S., p. 224).

And the commission, from the very first case up to the present time, has stated the same thing and adjudged it in numerous cases. Judge Cooley *in re* the L. & N. petition laid it down:

"That the existence of actual competition, which is of controlling force, in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than the shorter haul" (1 I. C. C. Rep., 32).

The law, then, is clear and settled by the highest authority, and there is no dissonance in the decisions.

What are the facts in this case and do they establish "effective competition;" "competition that affects rates;" "actual competition which is of controlling force in respect to traffic important in amount"?

The evidence was then fully reviewed by counsel for Behlmer. Both parties recognized that this court had in the "Import Rate case" (Texas Pacific Railway Company *vs.* Interstate Com. Com., 162 U. S., 197) laid down the law for this country, and definitely and conclusively decided that "competition that affects rates should be considered."

In view of this, after arguing the evidence in the fullest possible manner, counsel for both sides in briefs expressly requested the circuit court of appeals to find on this matter of competition, and in the language of the counsel for the roads it was asked "in its opinion or decree to set forth the "facts as found by it with reference to the competition upon "which the appellees rely and as to whether it is such as "affects rates.

CIRCUIT COURT OF APPEALS FINDS AS MATTER OF FACT FROM "ENTIRE BODY OF EVIDENCE" THAT CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY SIMILAR, AND ADOPTS SAME FINDING OF COMMISSION. SUPREME COURT WILL NOT DISTURB.

In response to the above-mentioned request of counsel on both sides and in pursuance of its duty "to decide as a court of equity upon the entire body of evidence" (168 U. S., 175), the circuit court of appeals found the facts clearly, distinctly, absolutely, and conclusively as follows:

"The appellees (the railroads) alleged, both before the "commission and the court below, such substantial dis- "similarity of circumstances and conditions as justified them "in making the greater charge for the shorter haul com- "plained of in the petition, and upon them was the burden "of showing affirmatively that such circumstances and con- "ditions were in fact substantially dissimilar. The commis- "sion in ascertaining the facts found against this claim of "the railroad companies, &c." (Trans., 130; 42 U. S. App., 581).

Continuing, the circuit court of appeals says:

"* * * We have now to determine whether or not the "facts found by the commission are supported by the evi- "dence taken in this case, or, in other words, whether or "not the circumstances and conditions attending the trans- "portation of hay from Memphis to Summerville are so dis- "similar as to justify the rates charged, respectively. Does "the competition set up by the appellees (the railroads) as "existing by water between Chicago and the North Atlantic "ports, and the competition by rail between Memphis and "Charleston, as also the competition of market with market, "constitute substantial dissimilar circumstances and condi- "tions within the meaning of the said fourth section of the act "to regulate commerce? Did such competition in fact affect "rates between Chicago, the North Atlantic ports, and Charles- "ton? We are of the opinion that it was not of controlling "force; that it was not such effectual competition as would "constitute the dissimilar circumstances and conditions "which would justify the commission, upon application to "it, in authorizing the carrier to charge less for the longer "than for the shorter haul" (Trans., p. 131; 42 U. S. App., 581).

Again, the court says further on in its opinion:

"The rate from Memphis to Charleston on hay and grain "and like products is reasonable, and is shown by the evi- "dence to be remunerative; it is fair to presume that it

"would not have been made by the railroads, unless those "controlling them were satisfied that it would be so, and, "consequently, to justify the higher charge for the shorter "haul to Summerville, *which, we have found, was made under "substantially similar circumstances and conditions*, the com- "mission, after application to it for that purpose, must find "certain reasons for the same, after due investigation, that "may in fact exist, but which, we are compelled to say, are "not now disclosed by the record before us. In the light of "the act to regulate commerce, and keeping in view the "theory upon which it was constructed, it is not difficult to "understand why application was not made to the commis- "sion for permission to charge less for the longer haul to "Charleston than for the shorter haul to Summerville, when "the rate proposed was 19 cents per 100 pounds for the "longer and 28 cents per 100 pounds for the shorter" (pp. 132, 133, Trans.; 42 U. S. App., 581. Italics mine).

Again:

"Finding the facts to be as above indicated, substantially "as found by the Interstate Commerce Commission in the "proceedings instituted before it" * * * (Trans., 133.)

These extracts show beyond doubt that after the fullest consideration of all the evidence the circuit court of appeals decided and determined that as a matter of fact the circumstances and conditions were similar and that it adopted the same findings of fact made by the commission, and it held with the commission that the competition set up by the roads was not effective; that it did not affect rates, nor was it of controlling force.

Findings of fact such as these where two courts have concurred or where the conclusions of a master or an independent tribunal or commission have been adopted by a court are held to be binding on this court and conclusive, and, in the language of Mr. Justice Brown, "so far as there is any testimony consistent with the finding, it must be treated as unassailable."

Davis *vs.* Schwartz, 155 U. S., 636.
Wiscart *vs.* D'Auchy, 3 Dall., 321.
Bond *vs.* Brown, 12 How., 254.
Graham *vs.* Bayne, 18 How., 60–62.
Norris *vs.* Jackson, 9 Wall., 125.
Ins. Co. *vs.* Folsom, 18 Wall., 237–249.
The Abbotsford, 98 U. S., 440.
Crawford *vs.* Neal, 144 U. S., 585.
Turner *vs.* Ferris, 145 U. S., 132.
Evans *vs.* State Bank, 141 U. S., 107.
Kimberly *vs.* Arms, 129 U. S., 512.
Morewood *vs.* Enequist, 23 How., 491.

The Ship Marcellus, 1 Black, 414–417.
Dravo *vs.* Fabel, 132 U. S., 487–490.
Companie de Navigacion *vs.* Brauer, 168 U. S., 104–123.
The Richmond, 103 U. S., 540.
The Conqueror, 166 U. S., 110–136.
Stuart *vs.* Hayden, 169 U. S., 14.
Baker *vs.* Cummings, 169 U. S., 198.

Justice Jackson in K. & I. Bridge Co. *vs.* L. & N. R. R. Co., 37 F. R., p. 613, said:

"The functions of the commission are those of referees or "special commissioners, appointed to make preliminary in- "vestigation and report upon matters for subsequent judicial "examination and determination. In respect to interstate "commerce matters covered by law, the commission may be "regarded as the general referee of each and every circuit "court of the United States, upon which the jurisdiction is "conferred of enforcing the rights, duties, and obligations "recognized and imposed by the act."

The eminent personnel of the commission, frequently commented upon by this court, makes them, however, far superior to any ordinary master or referee in chancery, and findings of fact made by them are entitled to greater weight, and the rule of this court laid down in so many cases is thus strengthened and reinforced, and this court will not disturb a finding of fact concurred in by the circuit court of appeals and the commission.

Such has been the invariable course of this court in every case of the sort so far brought before it.

The cases are all reviewed in the Alabama Midland opinion (168 U. S., pp. 174–185), and that case itself is an authoritative illustration of the operation of the rule, for this court refused to interfere with or disturb the facts as found by the two lower courts, although, as Mr. Justice Shiras noted, much conflicting evidence was encountered.

Amongst other authorities cited in the Alabama Midland decision is one that is on all fours with the case at bar and decisive of it. This is the famous "Social Circle case," reported in the books as *Cinn., N. O. and Texas Pacific R. W. Co. vs. I. C. Com.*, 162 *U. S.*, 184.

The situation in the Social Circle case was precisely the same as the situation in the case at bar, save that for certain reasons the present case is stronger.

In the Social Circle case the commission ruled against the railroads.

In the case at bar the commission ruled against the roads.

In the Social Circle case the circuit court overruled the commission.

In the case at bar the circuit court overruled the commission.

In the Social Circle case the circuit court of appeals reversed the circuit court by a general decree, no opinion being filed.

In the case at bar the circuit court of appeals reversed the circuit court and filed an opinion expressly finding facts and adopting the findings of the commission in the most distinct and emphatic manner. A rehearing was asked for and refused.

So the situation is precisely the same in both cases, except that the present case is stronger and clearer on account of the opinion being filed and the rehearing being refused.

Mr. Justice Shiras in the Alabama Midland opinion thus describes the action of the Supreme Court in the Social Circle case. He says:

"In the case of Cincinnati, N. O. and Texas Pacific "R. W. Co. *vs.* I. C. Com. (162 U. S., 184) the findings of the "commission were overruled by the circuit court, after addi- "tional evidence taken in the court, and the decision of the cir- "cuit court was reviewed in the light of the evidence and re- "versed by the circuit court of appeals, and this court, in refer- "ence to the argument that the commission had not given due "weight to the facts that tended to show that the circum- "stances and conditions were so dissimilar as to justify the "rates charged, held that as the question was one of fact, "peculiarly within the province of the commission, and as "its conclusions had been accepted and approved by the "circuit court of appeals, and as this court found nothing "in the record that made it our duty to draw a different "conclusion, the decree of the circuit court of appeals should "be affirmed" (168 U. S., 174, 175).

It seems conclusively settled, then, that this court will not disturb findings of fact concurred in by the circuit court of appeals and the commission, and that "so far as there is "any testimony consistent with the finding it must be "treated as unassailable."

ALL THE TESTIMONY FULLY SUSTAINS THE CIRCUIT COURT OF APPEALS AND THE COMMISSION, AND THERE IS NO CONFLICT OF EVIDENCE.

For the convenience of this court all the testimony on this question of competition will be now set out.

Before doing this, however, we must ascertain the issues,

for this court has said in the "Import Rate case," 162 U. S., 238: "The question whether certain charges were reasonable or otherwise, whether certain discriminations were "due or undue, were questions of fact, to be passed upon by "the commission in the light of all the facts *duly alleged and* "*supported by competent evidence.*" * * * (*Italics* mine.)

In reviewing this Import Rate case, in the Alabama Midland decision (168 U. S., 175), the language of this court is:

"So, in the case of Texas and Pacific Railway Company "*vs.* Interstate Com. Com. (162 U. S., 197), the decision of "the circuit court of appeals, which affirmed the validity of "the order of the commission upon the ground that, even if "ocean competition should be regarded as creating a dis-"similar condition, yet that, in the case under consideration, "the disparity in rates was too great to be justified by that "condition, was reversed by this court, not because the cir-"cuit court had no jurisdiction to consider the evidence and "thereupon to affirm the validity of the order of the com-"mission, but because that issue was not actually before the "court, and no testimony had been adduced by either party "on such an issue." * * *

These announcements make it clear that the courts can only act upon issues duly alleged, and can only consider "competent testimony." Hence the necessity of ascertaining the issues.

At page 5, Trans., appears the detailed allegations of Behlmer charging a violation of section 4 of the act to regulate commerce, and the disobedience of the commission's order to cease and desist.

At page 33, Trans., in their joint and several answer, section 11, the railroads admit the willful disobedience of such order.

They set up in justification:

1. Competition by rail from Memphis (Trans., p. 35).

2. Competition by water—lake, canal, and ocean—from Chicago, and by ocean from North Atlantic ports (Trans., p. 39).

3. Competition between market and market (Trans., pp. 38, 39).

These are the only "facts duly alleged," and they constitute all the isues on the question of competition. It is important to keep this in mind, for at page 56, Trans., it appears that the railroads attempted at the hearing before the commission to prove water competition between Memphis and Charleston by way of the Mississippi river, the gulf of Mexico, and the Atlantic ocean, thus showing competition between the point of shipment and the point

of destination. As soon as this attempt was made, counsel for Behlmer objected on the ground that no such defense was set up in the answer, and petitioner was therefore wholly unprepared on this point because no notice thereof had been given in the answer. Mr. Baxter immediately acknowledged the truth of this and said he would amend his answer if he could make the proof. The answer was never amended either before the commission or before the courts, so the point was abandoned.

Thus by the decisions of this court and as a matter of fact the only issues are the three above mentioned.

With this prelude and the additional remark that the burden of proof in establishing a justificatory defense and of facts peculiarly within one's knowledge is on the person setting up such defense or relying on such facts (139 U. S., 560), we now set forth all the evidence in the record bearing on these defenses.

At pages 55 and 56, Trans., we find the testimony of Mr. Jackson, a traffic manager and witness for the roads:

"Mr. BAXTER: I would like to know what all-rail lines, if any, actually compete for traffic between Memphis and Charleston?

"Mr. JACKSON: Initial lines?

"Mr. BAXTER: Yes, sir.

"Mr. JACKSON: The Memphis and Charleston and its connections, the Louisville and Nashville and its connections, the Kansas City, Memphis and Birmingham and its connections, and the Illinois Central and its connections.

"Mr. BAXTER: Are any one of those four initial lines at Memphis in anywise controlled or managed by the others?

"Mr. JACKSON: No, sir.

"Mr. BAXTER: You say they actually compete?

"Mr. JACKSON: Unless you consider that the Louisville and Nashville has some control of the Georgia railroad.

"Mr. BAXTER: You mentioned four initial roads and did not mention the Georgia railroad. Have any of those four initial lines any control or management over the others?

"Mr. JACKSON: No, sir.

"Mr. BAXTER: You say those four lines out of Memphis actually compete for the traffic. Do you mean they offer to compete or actually carry traffic?

"Mr. JACKSON: Actually carry traffic.

"Mr. BAXTER: They all compete at agreed rates?

"Mr. JACKSON: Yes, sir.

"Mr. BAXTER: How are those rates agreed upon?

"Mr. JACKSON: They are rates that are established or made by the rate committee of the Southern Railway and Steamship Association.

"Mr. BAXTER: Those four initial lines are all members of that association.

"A. Yes, sir.

"Q. So the way they are agreed upon is through the representatives of those four lines on the rate committee of the Southern Railway and Steamship Association?

"A. Yes, sir."

Competition down the Mississippi and by ocean *via* New Orleans is then attempted to be proved, but witness does not know of any charter rates on hay or grain by sea from New Orleans (Trans., p. 56).

(Trans., pp. 57, 58:)

"Q. What rates have been obtained on hay from Chicago to Charleston *via* the lakes, canal and ocean?

"A. I have been shown an invoice in which a rate of 23 cents was granted from Chicago to Charleston. * * *

"The invoice I saw was on a shipment of corn from Chicago to Charleston, sold and delivered to the party at Charleston, and from the invoice was deducted a rate of 23 cents, and, under the name of the concern, the rate was shown, 23 cents per hundred pounds, *via* the W. T. Co. and Clyde line."

P. 58:

"Q. When the lakes are open, what proportion of business from Chicago to Charleston comes by water and rail lines?

"A. I am not able to state the proportion of business. I can only state, in a general way, that the business *via* the all-rail lines is materially affected by that movement. * * *

"Q. Please refer to page 5, Mr. Jackson, and state what the all-rail rate on class D is from Chicago *via* Ohio River points to Charleston?

"A. 33 cents.

"Q. What is the all-rail rate on 6th class, which, I understand, includes hay, from Chicago to New York?

"A. 25 cents.

"Q. What is the all-rail rate from Chicago to Baltimore on same class?

"A. I am informed it is 22 cents. My recollection is that there is a differential of 3 cents on the rates from Chicago to New York, and the rates from Chicago to Baltimore, I am informed, is 22 cents.

"Mr. BAXTER: What rates are charged by schooners from Baltimore to Charleston on class D?

"Mr. JACKSON: Mr. Molony stated to me distinctly yester-

day that he had brought in cargoes of grain from Norfolk and Baltimore by schooner at 2 cents per bushel—equal to about 4 cents per hundred pounds.

"Mr. BAXTER: If that be so, from Chicago to Charleston via Baltimore, a rate can be obtained by rail and schooner on hay of 26 cents a hundred pounds?

"Mr. JACKSON: Yes, sir.

"Mr. BAXTER: Do you know what the rail and water rate on class D is from Chicago to Baltimore?

"Mr. JACKSON: I am informed they have a 12 cent rate.

"Mr. BAXTER: By taking the rail and water rate from Chicago to Baltimore and adding the schooner rate from Baltimore to Charleston, a rate of 16 cents on hay and grain can be obtained from Chicago to Charleston?

"A. Yes, sir."

At page 59, Trans., witness says the price of hay in New York on a given date is $15 per ton and in Memphis $12.75 per ton, and the rate on the Clyde line is $1.60 per ton and the rate from Memphis all rail to Charleston is $3.80 per ton on this class, and that the rates to Charleston from Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, and Paducah are 23 cents per 100 pounds; from St. Louis and East St. Louis, 28 cents; from Memphis, 19 cents. Rates from Cairo, East Cairo, Belmont, and Columbus to Charleston are 23 cents.

Witness, at page 60, says these rates bear certain relations to rates from Chicago to Charleston, and if this relation were changed, in his opinion, the grain and hay would move to the North Atlantic ports and come south by coastwise vessels.

At page 61, Trans., he says that between Augusta and Charleston the Port Royal and Augusta railroad and the Savannah and Charleston compete for the business with the South Carolina and Georgia, and there is only ten miles difference in distance over this route.

At pages 62 and 63, Trans., cross-exam., Mr. Jackson says:

"Mr. NORTHROP:

"Q. Are there any shippers taking grain or hay from Memphis to New Orleans and carrying it from New Orleans by water to Charleston? If so, mention the lines and shippers.

"A. I do not know of any actual movement.

"Q. Do you know any actual shippers or purchasers who convey freight of this class D through from Chicago over the lakes and canals and down by the sea to Charleston?

"A. Not of my own knowledge.

"Q. You have not heard of any considerable movement of grain or hay to Charleston that way?

"A. Yes, sir.

"Q. Large shipments?

"A. Yes, sir. I was informed by a heavy grain dealer in Charleston that over a year ago there were more than 1,100 cars of grain, flour and hay.

"Q. Do you know of any such shipment in existence at present?

"A. No; I do not know of any just now.

"Q. Then there is no large movement or any movement of considerable extent of grain and hay from Chicago *via* the lakes and by sea to Charleston now?

"A. I do not know of any at the present time.

"Q. You have made it a subject of inquiry?

"A. Yes, sir; I do not suppose there is any movement just now.

"Q. So you do not think there is any actual competition by water from Chicago to Charleston?

"A. I do not understand that movement is necessary to produce competition; the existence of the rate produces it.

"Q. There cannot be any competition unless the stuff is carried. All these four competing railroads are subject to the provisions of the act to regulate commerce, are they not? They carry the traffiic between different States?

"A. Oh, yes, sir.

"Q. All belong to the Southern Railway and Steamship Association?

"A. Yes, sir.

"Q. There is no competition among these roads; all have the same rates?

"A. All those initial lines work the same rates between the same points.

"Q. There is no cutting of rates between them?

"A. I do not know.

"Q. Is not this grain and hay that comes from New York, for instance, raised in the West and then brought to New York for shipment by sea, most of it?

"A. You mean the hay and grain that comes into this territory?

"Q. Yes, sir.

"A. Yes, sir; I will say that the grain was raised in the western grain places.

"Mr. NORTHROP: Do you know of any existing steamship lines or other water carriers from Baltimore to Charleston conveying this grain in large quantities or to any considerable extent?

"Mr. JACKSON: No, sir; I am not personally familiar with the lines in the grain business.

"Mr. NORTHROP: You do not know of any?

"Mr. JACKSON: No, sir.

"Mr. NORTHROP: You have made inquiry?

"Mr. JACKSON: Yes, sir; I have made inquiry."

On redirect examination, at pages 63, 64, Trans., he says there is "some eastern hay," but the hay from Memphis is raised in Missouri and Illinois; that tariffs do not indicate movement, and that competition commences right on the farms, some lines *via* Ohio river and some *via* Chicago.

At page 65, Trans.:

"Commissioner KNAPP: Is there considerable movement of hay and grain from Memphis to Charleston?

"Mr. JACKSON: Very considerable; yes, sir.

"Commissioner KNAPP: Can you give any idea of the amount during any given period of time?

"Mr. JACKSON: No, sir; no definite idea.

"Commissioner KNAPP: More or less of that traffic is moving all the time?

"Mr. JACKSON: Yes, sir."

At page 66, Trans., Mr. Waring, a traffic manager and witness for the roads, says:

"Question No. 10. What is the rate on grain and hay from Chicago via the Erie canal and New York to Charleston?

"Answer. Have no knowledge.

"Question No. 11. What is the rate on this class of freight from Boston to Charleston?

"Answer. 20 cents per 100 pounds.

"Question No. 12. From New York to Charleston?

"Answer. 14 cents per 100 pounds.

"Question No. 13. From Philadelphia to Charleston?

"Answer. 14 cents per 100 pounds.

"Question No. 14. From Baltimore to Charleston?

"Answer. No steamer line from Baltimore to Charleston. Rail and water rate via Virginia ports, 17 cents per 100 pounds."

At page 69 witness says:

"Q. Is there any actual grain coming in here now by way of water from Chicago in large quantities?

"A. I don't think so. * * *

"Q. You do not know whether there is any handled by water to Charleston?

"A. I could not answer that positively. There is from time to time an amount of baled hay and grain *via* the Clyde steamship line from New York to Charleston; but as to the origin of that grain I do not know.

"Q. Is it very large?

"A. No, sir; very small."

Mr. Kracke, a large grain dealer in Charleston for 30 years, at page 70 says:

"Q. How does it (grain) reach here now; all rail?

"A. All rail; yes, sir."

He goes on to say no hay or grain comes to Charleston by water from Memphis, and he has never heard of any coming that way.

At pages 70, 71, cross, he says:

"Q. What is the price of hay in Chicago?

"A. I really don't know. I have not sold a bale of hay in that country for a long time. Hay that comes from Memphis is raised in Missouri.

"Q. Don't you know of shipments of grain from Chicago *via* the lakes and canals to New York, and thence by steamer or vessel to Charleston?

"A. I have heard of them, sir; I think about 4 years ago. The prices in Chicago do not justify that now. They are too high in Chicago now. * * *

"Q. I am requested to ask you if last winter there were not some cargoes of grain brought here from Virginia ports.

"A. I think last summer one or two cargoes were brought here.

"Q. From what point?

"A. Norfolk.

"Q. Did that originate there, or where was it grown?

"A. Up in that vicinity, I suppose.

"The CHAIRMAN:

"Q. Where did you say?

"A. Norfolk, Virginia.

"Mr. NORTHROP:

"Q. Does very much of this Virginia grain come to this market, Mr. Kracke?

"A. Not very much. Sometimes large volumes come from the West.

"Q. Maine and Virginia do not play a very large part, do they?

"A. No, sir."

At page 75, Trans., General Manager Ward, S. C. R. R., a witness for the road, says:

"Commissioner KNAPP:

"Q. A large proportion of your business is bringing this hay and grain from the West?

"A. Nearly all of our east-bound business is that."

At page 74, Trans., he says:

"Well, three-fourths of our business is that kind of freight. I think that would be the average freight. I can tell you what an immense tonnage of hay we haul. We haul 9,600,000 pounds of hay. So you see it is quite an item in our business."

At pages 75, 76, 77, Trans., Mr. Molony, a witness for the roads, a grain dealer in Charleston, says he has brought one shipment of grain by rail, lake, and ocean to Charleston at 23 cents per 100 pounds. Ocean shipment was by Clyde steamship line; that he has not bought any grain or hay in Chicago for sixteen months, and that he can get a schooner rate from New York on hay of 8 cents per hundred; never heard of any hay or grain coming from Memphis to Charleston by water; says he generally buys west; that ordinarily the prices are better in the West than in the East, and he would look to the cheaper market. The average difference in price would be $3.50 per ton in favor of Memphis over New York."

At page 86, Trans., Theo. Nathan, a witness for the roads and a grain dealer, says:

"By far the greater part of grain and hay that comes to Charleston comes directly from the West by rail."

This testimony clearly establishes that at Charleston there is no "competition that affects rates," to use the language of the Supreme Court. We will now analyze this testimony:

THE ALLEGED COMPETITION BY RAIL DOES NOT "AFFECT RATES."

All the alleged rival rail lines are proved to be members of the Southern Railway and Steamship Association (Trans., pp. 55, 56, 95), and they all abide by the rates this association fixes. How can competition affect rates agreed upon beforehand?

The agreement here is not to compete. The rates by the rail lines are the same for all lines, and are made by a rate

committee or commissioner appointed to act for them. None of them will carry a ton for less than the rate agreed upon, so none of them are ever called upon to meet competition between themselves that "affects rates." They are in fact but one organization, and one rate is made for the whole. We have said it is an agreement not to compete, and this is clearly established.

At page 98, Transcript, we find in article 13 of the "agreement of the Southern Steamship & Railway Association" that the commissioner "shall also have authority to reduce the rates when necessary to *meet the competition* of lines or roads not parties to this agreement, *and of lines parties to this agreement, when such lines fail to maintain the rates as established under the agreement*, and he may at the same time make corresponding reductions from other points from which relative rates are made." (Italics mine.)

At page 101, Trans., we find, in article 23, sec. 2:

"It is distinctly understood and agreed that the maintenance of rates, as established under the rules of the association, is of the very essence of this agreement, and the parties hereto pledge themselves to maintain them and to require all their connections to maintain such rates, and in the event of any company or line or its connections not members of the association failing to conform to this obligation, the other parties in interest pledge themselves to increase their proportions of through rates sufficiently to protect the authorized rates, and to apply full local rates upon all traffic, subject to the association agreement, coming from or going to such *offending* lines, whenever required by the commissioner to do so." (Italics mine.)

Then follows a provision as to penalties to be imposed for the "offense" of competing, and as the roads are required to deposit amounts, not less than $500 nor more than $5,000, these penalties can be promptly collected.

In the face of this agreement, we say it is an insult to our intelligence to assert that any "competition that affects rates" can exist between the parties to it.

The "maintenance of rates as established under the rules "of the association is of the very essence of this agree-"ment," and rates are only to be reduced "when necessary "to *meet the competition* of lines or roads not parties to this "agreement, and of lines parties to this agreement when "such lines fail to maintain the rates established under this "agreement." Whoever drew that agreement is entitled to credit for a clear and cloudless style. No room is left for doubt here. The "offense" of competition is punishable

"by fine," and the lash of "full locals" is to be also applied to a recalcitrant.

But the effect of agreements such as these is no longer an open question, and it has been conclusively settled by this court that they eliminate and destroy competition.

At the present term this court construed a traffic agreement far less strong in its terms than the one in this case, and held absolutely that it stifled competition. Mr. Justice Peckham, speaking for the court, said:

"The question really before us is whether Congress, in the "exercise of its right to regulate commerce among the several States, has the power to prohibit, as in restraint of "interstate commerce, a contract or combination between "competing railroad corporations entered into and formed "for the purpose of establishing and maintaining interstate "rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established "are reasonable. Such an agreement directly affects, and, "of course, is intended to affect, the cost of transportation of "commodities, and commerce consists, among other things, "of the transportation of commodities, and if such transportation be between States it is interstate commerce. The "agreement affects interstate commerce *by destroying competition* and by maintaining rates above what competition "might produce."

U. S. *vs.* Joint Traffic Ass., 171 U. S., 568, 569. (Italics mine.)

Again:

"Under these circumstances the agreement, taken as a "whole, prevents and was evidently intended to prevent, "not only secret but any competition" (171 U. S., 564).

Again:

"The natural, direct and necessary effect of all these various provisions of the agreement is to prevent any competition whatever between the parties to it for the whole time "of its existence. It is probably as effective in that way as "would be a provision in the agreement prohibiting in terms "any competition whatever" (171 U. S., 565).

Again:

"Where the grantees of this public franchise are competing "railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination

"among them by means of which competition is to be "smothered" (171 U. S., 570).

Again:

"We think it extends at least to the prohibition of con-"tracts relating to interstate commerce, which would ex-"tinguish all competition between otherwise competing "railroad corporations, and which would in that way restrain "interstate trade or commerce. We do not think, when the "grantees of this public franchise are competing railroads "seeking the business of transportation of men and goods "from one State to another, that ordinary freedom of con-"tract in the use and management of their property requires "the right to combine as one consolidated and powerful "association for the purpose of stifling competition among "themselves, and of thus keeping their rates and charges "higher than they might otherwise be under the laws of "competition" (171 U. S., 570–571).

To same effect see U. S. *vs.* Trans-Missouri Freight Ass., 166 U. S., 290.

It is clear, then, that traffic agreements such as the one in the case at bar wholly smother and destroy competition, and that roads which are parties to such agreements are not competing roads, but "one consolidated and powerful association." Hence in this case all the alleged rival lines being members of the Southern Railway and Steamship Association and parties to the agreement, they are not competitors, and the claim that their rates are affected by competition is without foundation, for competition has been totally destroyed by convention.

This alleged terrific competition between railroads under agreement not to compete recalls a speech of Mr. Gladstone, made in 1844 before Parliament, reported in the third person according to the English style: "It was said let matters "go on as at present and let the country trust to the effects "of competition. Now, for his part, he would rather give "his confidence to a Gracchus, when speaking on the sub-"ject of sedition, than give his confidence to a railway "director, speaking to the public of the effects of competi-"tion—railway companies were singularly philanthropic "among themselves. Their quarrels were lovers' quarrels, "and they reminded him of a quotation once felicitously "made use of by Mr. Fox, '*Breves inamicitiæ, amicitiæ "'sempiternæ*'" (Hansard's Debates, third series, volume LXXVI, p. 500).

The evidence, therefore, conclusively supports the finding

of fact made by the circuit court of appeals, concurring with the commission, that the competition set up between alleged rival rail lines was not such as to "affect rates;" hence, in the language of this court, as there is "testimony "consistent with the finding, it must be treated as unassail-"able" (155 U. S., 636, and cases hereinbefore cited).

This brings us to the next question of fact, namely, water competition.

THE ALLEGED COMPETITION BY WATER DOES NOT "AFFECT RATES."

As to the water competition, none from Memphis to Charleston has ever been heard of, and that contention was abandoned by the roads (Trans., p. 56). Mr. Jackson says no large movement of grain or hay exists from Chicago by lake, canal, or ocean to Charleston. Mr. Waring says the same thing. Mr. Molony sixteen months before the hearing made one shipment that way. Mr. Kracke does not even know the price of hay in Chicago, it has been so long since he purchased any there. Maine and Virginia hay play no part in this market. Mr. Molony says he does not buy from Baltimore, but has shipped by the Clyde line from New York once or more than once. They all unite in saying that they principally buy from the West and that these articles consumed in this territory are chiefly, if not wholly, grown in the West—Kansas, Missouri, and Illinois.

General Manager Ward says nearly all the east-bound business of the South Carolina road consists of this traffic.

"I can tell you what an immense tonnage of hay we have. We haul 9,600,000 pounds of hay."

Mr. Nathan says it mostly comes all-rail from the West. In fact the testimony is unanimous on this point.

In the face of all this can it be contended that there is any "effective competition" by water?

Not a single witness testifies that he has ever himself shipped nor has he any personal knowledge of any shipments from Baltimore and Norfolk. The most that we get from the testimony is that such shipments have been vaguely heard of. Four grain dealers out of the five doing business in Charleston were examined—Kracke, Molony, Nathan, and Jones—and not one has said he ever shipped a bale of hay or a pound of grain from Norfolk or Baltimore, and out of all these Molony is the only one who says he shipped from Chicago, and that was sixteen months ago. Even in this he has vague recollections and says it was brought by the Clyde line, which is a member of the Southern Railway and Steamship Association, pledged under

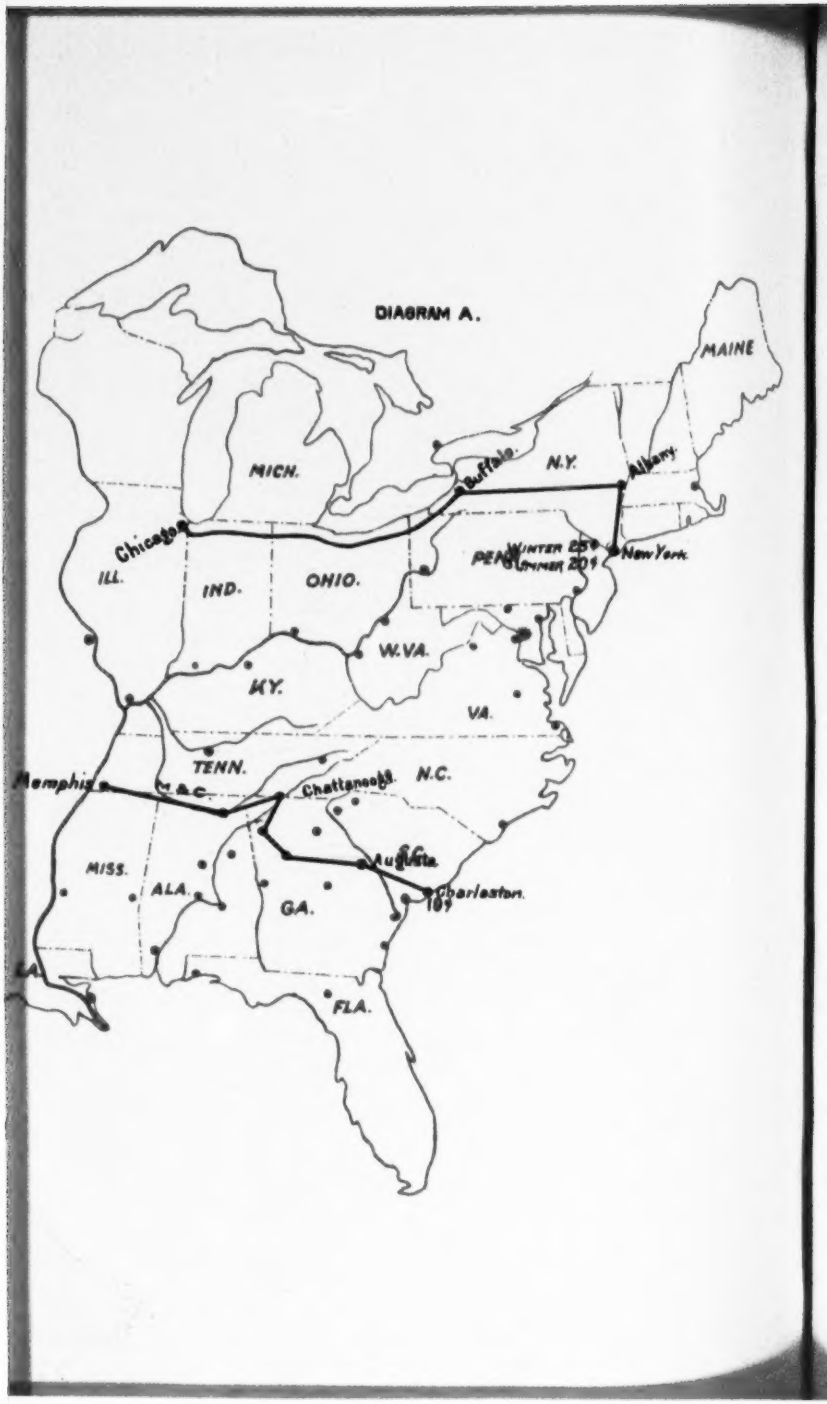


DIAGRAM A.
MAINE
MICH.
Buffalo
N.Y.
Albany
Chicago
ILL.
IND.
OHIO.
PEAK
WINTER 259
SUMMER 209
New York
W.VA.
KY.
VA.
TENN.
Memphis
N.C.
Chattanooga
Augusta
Charleston
MISS.
ALA.
GA.
189
FLA.

penalty to maintain its rate of 14 cents from New York (Trans., p. 95).

By article 12 of that document they "agree to protect the "water lines or combined water and rail lines," and *vice versa*. He says he can get a schooner rate of 8 cents per hundred from New York; but it is significant that he omits to assert that he ever did, and that he tells us the one Chicago shipment he made came by the Clyde steamship line (Trans., pp. 76, 77). He distinctly says he principally buys west, because the prices are better.

The burden of proving competition of controlling force and important volume, actually existing and not mythical and chimerical, was on the roads. All the testimony proves the very opposite, and the finding of the circuit court of appeals is fully sustained by the evidence.

The following diagrams, "A" and "B," clearly illustrate the inefficiency of the water competition set up in this case, namely, that from Chicago and that from North Atlantic ports, no other water competition being alleged in the pleadings or put in issue.

WATER COMPETITION FROM CHICAGO DOES NOT "AFFECT RATES" FROM MEMPHIS.

Defendants say water competition from Chicago *via* the lakes, canal, Hudson river, and ocean force the rate from Memphis to Charleston down to 19c. If this be true, how can the roads that run along the very margin of the lakes to New York city maintain a rate of 20c. per 100 lbs. when the lakes are open, and 25c. per 100 lbs. when the lakes are closed? (Trans., p. 90.)

They must prove "competition that affects rates." If the rail rates between Chicago and New York are not affected by the water competition between those points so as to fall below 20c. or 25c., can it be that the rates between points 800 or 900 miles distant from lake and canal feel it to a more terrific extent than these points themselves? Does this competition gather momentum with the distance?

This contention is clearly untenable, and the fact that the all-rail rates between Chicago and New York are not forced down below 20c. or 25c. proves beyond question that water competition from Chicago does not affect the all-rail rates between Memphis and Charleston. Surely it does not for six months when the lakes are closed.

It is a theory and not a condition that confronts us.

WATER COMPETITION FROM NORTH ATLANTIC POINTS DOES NOT "AFFECT RATES" FROM MEMPHIS.

The rates on hay and grain to Charleston are:

			All-rail.	Water.
From	Boston	to Charleston	31c.	20c.
"	New York	" "	28c.	14c.
"	Philadelphia	" "	28c.	14c.
"	Baltimore	" "	22c.	17c.
"	Richmond	" "	17c.	
"	Norfolk	" "	17c.	

The water rates are given at page 67, Trans.

The all-rail are not in evidence, but are taken from the tariff sheets of the Atlantic coast line and are correct.

Now we ask:

If the water competition between Boston and Charleston forces the all-rail rate from Memphis to Charleston down to 19c., why does not this water competition from Boston to Charleston force down the all-rail rate from Boston to Charleston to less than 31c.?

How can the all-rail rates from New York to Charleston be maintained at 28c. against a water rate of 14c. between the same points when this very competition forces the all-rail rate between Memphis and Charleston down to 19c.?

How do the roads from Philadelphia manage to keep up a rate of 28c. to Charleston against a 14c. water rate when this is the identical and awful water rate which reduces the price from Memphis to Charleston to 19c.?

How do the carriers from Baltimore maintain a 22c. rate to Charleston against a rail and water rate of 17c.?

But, more marvelous still, how is all this managed in the teeth of an 8c. schooner rate from New York and a 4c. schooner rate from Baltimore?

Indeed, why is the Clyde Steamship Company, with its 14c. rate, not wiped off of the face of the water and the roads off of the face of the earth by this 4c. schooner rate?

The answer is very simple. This water competition does not "affect rates." It is not "effective competition." It is not "actual competition of controlling force in respect to traffic important in amount." It is not "competition that affects rates," even between the points of shipment and the points of destination. A few sporadic schooner shipments in the course of two or three years does not suffice. No effect on rates is produced.

It is a theory and not a condition that confronts us.

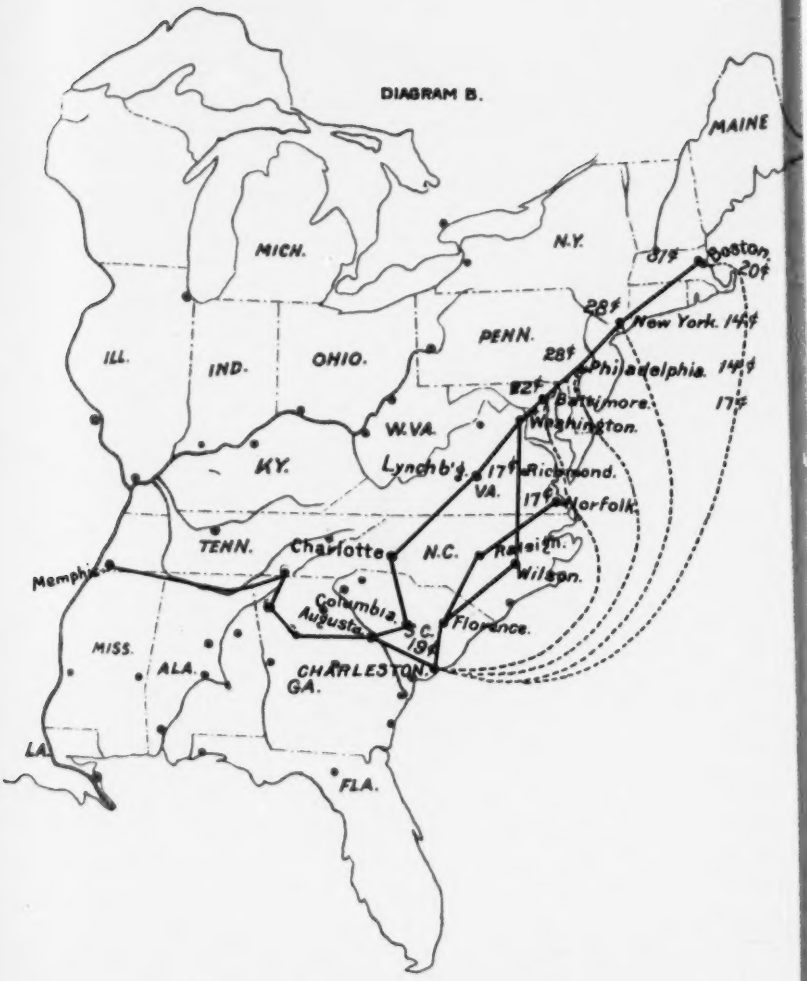


DIAGRAM B.
MAINE
MICH.
N.Y.
31¢
Boston.
20¢
28¢
New York. 14¢
PENN.
28¢
Philadelphia. 14¢
ILL.
IND.
OHIO.
22¢
Baltimore.
17¢
Washington.
W.VA.
KY.
Lynchb'g. 17¢
Richmond.
VA.
17¢
Norfolk.
TENN.
Charlotte
N.C.
Raleigh.
Wilson.
Memphis
Columbia.
Augusta.
S.C.
19¢
Florence.
MISS.
ALA.
CHARLESTON.
GA.
LA.
FLA.

THE SIXTEEN-CENT RATE FROM CHICAGO TO CHARLESTON.

In the courts below great stress was laid on an alleged 16-cent. rate from Chicago to Charleston. A critical examination of this will now be made.

In his brief before the circuit court of appeals, counsel for the roads said:

"The lake and rail rate from Chicago to Baltimore is 12 cents per 100 pounds." "Trans., p. 102" (*103 here*).

"The schooner rate from Baltimore to Charleston is 4 cents per 100 pounds, thus making a total rate from Chicago to Charleston—lake, rail, and schooner—of 16 cents per 100 pounds." "Trans., p. 57" (p. *58 here*).

Turning to page 103, Transcript in this court, we find a traffic sheet of the Erie and Western Transportation Company showing a rate of 12 cents to Baltimore.

As to this we have only to remark that for six months in the year ice stops navigation on the lakes; so this competition would only be "effective" for six months at most, and we are entitled to the benefit of the other six months when the lakes are closed. This benefit is accorded to all the rest of the country, why not to us?

Now, as to the 4-cent schooner rate. Turning to page 58, Transcript, we find:

Mr. BAXTER:

Q. "What rates are charged by schooners from Baltimore to Charleston on class D?"

Mr. JACKSON:

A. "Mr. Molony stated to me distinctly yesterday that he had brought in cargoes of grain from Norfolk and Baltimore by schooner at two cents per bushel—equal to about 4 cents per hundred pounds."

Will this court decide so grave an issue as this on mere hearsay evidence? And yet that is all the evidence my friend refers to. Is it not acknowledged the world over and laid down in all the books, from time immemorial, that the has found hearsay evidence so unreliable that courts will law not act on it?

The wisdom of this rule can never be better illustrated than right here, for Mr. Jackson, a traffic manager, a man of high intelligence and accurate habits, falls into this dangerous pit. If even a person of superior intellect fails to

repeat correctly, the law is certainly most wise in laying down this rule against hearsay.

He says: "Mr. Molony stated to me distinctly yesterday that he had brought in cargoes of grain from Norfolk and Baltimore by schooner at 2 cents per bushel—equal to about 4 cents per 100 pounds."

Now, what does Mr. Molony say. At page 76 of the Transcript we find:

Mr. BAXTER:

Q. "What rate can you obtain on hay from Norfolk and Baltimore to Charleston?"

Mr. MOLONY:

A. "I can get a rate from New York. I do not get much hay from Baltimore. I can get a rate from New York of $1.60 per ton, 8 cents per 100."

What a startling failure of proof. Not a word about any 4-cent rate at all from any point; not a syllable about any schooner rate whatever from Baltimore.

Mr. Jackson's recollection is full of flaws. He says Mr. Molony said Baltimore. Mr. Molony says he said New York. Jackson says Molony said grain. Molony says he said hay. Jackson says Molony said 4 cents. Molony says he said 8 cents. Mr. Jackson's testimony is obliterated.

And yet this is the entire basis of my friend's contention as to this 4-cent schooner rate from Baltimore.

We have here everything in the record on this point, and on the basis of Mr. Jackson's hearsay statement of what Mr. Molony said, repudiated by Mr. Molony himself, this court is asked to find that a schooner rate of 4 cents per hundred from Baltimore exists.

And upon such testimony as this, presented by those upon whom is the burden of proof, this court is asked to decide these momentous issues. This rate is advanced and pressed as the controlling factor in making rates from Memphis to Charleston, and all the testimony in the entire record is here set out.

Here is the very turning point, the keystone itself, of the justificatory defence of competition. To build upon the quicksands of hearsay is bad enough, but on those of repudiated hearsay is hopeless.

But all this serves at least one good purpose. It explains to our entire satisfaction the remarkable and contradictory but real truth set out by my friend at page 17 of his brief (*filed in C. C. A.*), namely: "From Baltimore to Charleston a rail and water rate of 17 cents per 100 pounds on hay can

e obtained *via* the Virginia ports, Norfolk," etc. (Trans., p. 6; *67 here*).

Can any one believe for a moment that if "effective competition" by water at 4 cents per 100 pounds existed between Baltimore and Charleston a rail and water rate of 17 ents per 100 pounds could be maintained? Undoubtedly ot. Would the merchants of Charleston be so ignorant as ven not to know the price of hay and grain in Chicago Trans., p. 71) if a 16-cent rate were available from that point? 'learly not.

Now let us analyze this hearsay testimony of Mr. Jackson little further. He says Mr. Molony told him "2 cents per ushel; equal to about 4 cents per 100 pounds" (Trans., . 58).

At page 76, Trans., we find:

"Mr. BAXTER:

"Q. Have you ever known what the charter rates would e? What it would cost to charter a vessel from New rleans to Charleston, to bring any kind of freight, hay or nything else around that way?"

"Mr. MOLONY:

"A. I never figured it myself, but I have heard from other eople who wanted to bring oats from Galveston and New rleans that they could make a rate of from four to six cents bushel."

"Q. How much is that per hundred pounds?"

"A. About 18 or 20 cents."

So Mr. Jackson is not even correct in his hearsay multiplication, for if 4 cents a bushel produces a rate of 18 cents, cents per bushel, instead of producing a rate of 4 cents per 00 pounds, would give a rate of 9 cents per 100 pounds according to Mr. Molony himself, Mr. Jackson's hearsay authority. It will be observed that on this point Mr. Molony oes into hearsay on his own account, and we thus have an xample of one of the most extreme forms of hearsay. It is earsay raised to the third power, and this court is asked to ase its judgment on such testimony.

In spite of this 12-cent rail and water rate to Baltimore, e all-rail routes offering the advantage of additional facilies in swiftness, &c., are able to maintain and do maintain rate of 17 cents per hundred from Chicago to Baltimore hen the lakes are open, and 22 cents when the lakes are osed (Trans., p. 90).

In spite of the 4-cent schooner rate, the rail and water rate om Baltimore to Charleston is 17 cents (Trans., p. 67).

Then, in spite of the 16-cent rate, even if considered as proved, which we deny, the all-rail rate from Chicago *via* Baltimore to Charleston is 34 cents to 39 cents, according to the season.

That is, the water competition does not "affect rates."

Thus we have an absolute demonstration reduced to a mathematical certainty that no water competition actually exists that "affects rates," even between the point of shipment and the point of destination.

It is utterly useless, then, to contend that if this effect is not produced directly it can be produced indirectly.

If it cannot and does not have an effect on the points themselves it is impotent to affect other and different points, having an advantage of from 800 to 1,000 miles in distance from the water competition set up, over the points on the very margin of the waters themselves, which points even are not affected.

ALLEGED SIXTEEN-CENT RAIL AND WATER RATE FROM CHICAGO DOES NOT "AFFECT RATES" FROM MEMPHIS TO CHARLESTON.

The rates on hay and grain to Charleston are:

	All rail.	Rail and water.
From Chicago to Charleston.....	33c.	16c.
From Memphis to Charleston.....	19c.	

Assuming for the sake of argument only that a sixteen-cent rail and water rate via Baltimore from Chicago to Charleston has been proved, although we deny it and have clearly shown that it is not so, and assuming the correctness of the allegation in the answer (Trans., p. 38) that the all-rail rate via Ohio River points is 33c., though no proof of same has been offered, this gives us the lowest figures between Chicago and Charleston, all rail and rail and water respectively. We have just seen that the all-rail rate via Baltimore varies, according to the season, from 34c. to 39c.

Taking, then, these lowest figures, what do they show?

Here we have the lowest rail and water rate anywhere suggested, and it ought to have its most powerful effect on the all-rail rates between the points directly affected—that is, Chicago and Charleston, the point of shipment and the point of destination. The roads between Chicago and Charleston must meet this rail and water rate, we are told, or be destroyed.

How comes it, then, that the all-rail rate between Chicago and Charleston is 33c. in spite of a rail and water rate be-

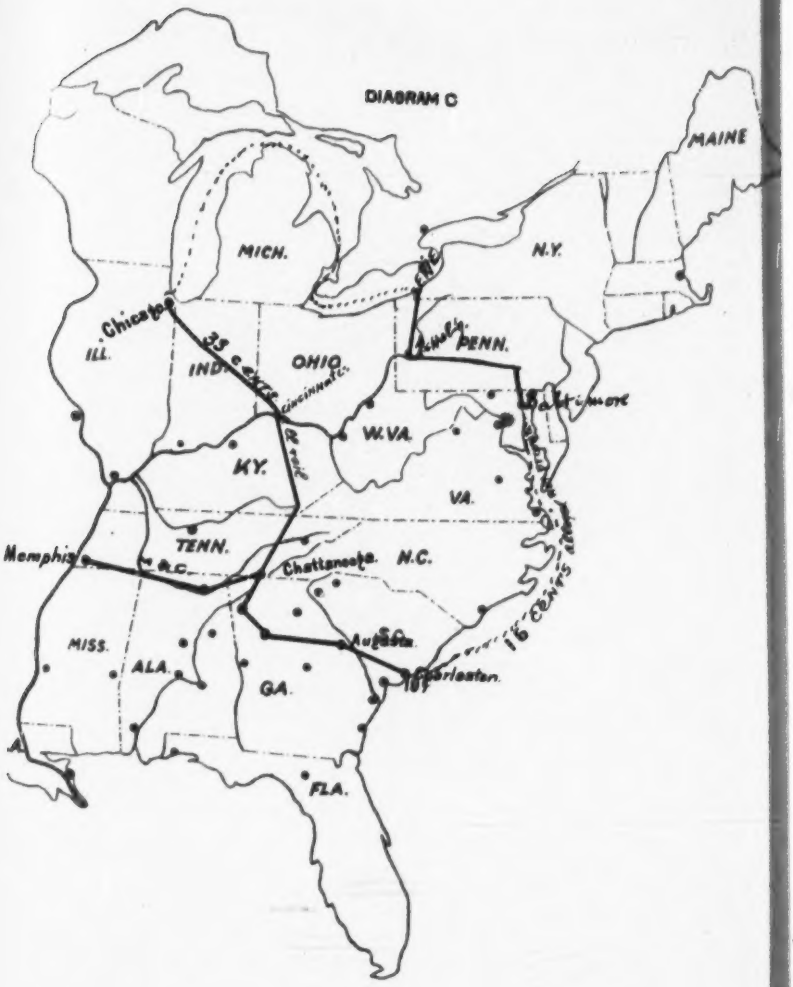


DIAGRAM C
MAINE
MICH.
N.Y.
Chicago
ILL.
IND.
OHIO
PENN.
Baltimore
W.VA.
KY.
VA.
TENN.
Memphis
N.C.
Chattanooga
MISS.
ALA.
GA.
Augusta
Charleston
FLA.

tween the same points of only 16c.? Can it be possible that the all-rail lines between Chicago and Charleston are able to maintain their rates at 33c. in the face of a rail and water competition to which they are directly exposed, while the all-rail lines between Memphis and Charleston, hundreds of miles distant from the water line, have their rates forced down to 19c. by this very competition?

The circuit court of appeals and the commission refused to believe this, and held that the water competition set up was not "effective," that it was not of "controlling force," and that it did not "affect rates."

All the testimony sustains this view and it is unassailable.

WATERWAYS ARE COMPLEMENTS AND AIDS TO RAILWAYS AND NOT RUINOUS COMPETITORS.

Before concluding the discussion of water competition appellee begs leave to direct the attention of this court to the fact that the strongest and most prosperous roads in this country run along the margin of the Great Lakes and the Hudson river, and that waterways are not ruinous competitors of railways. The disastrous character of water competition has been greatly exaggerated by the railroads in the cases coming before the courts and the commission. It is important to understand the truth on this subject.

At pages 68, 69 of a most interesting and able monograph entitled "Inland Waterways, Their Relation to Transportation," by Emory R. Johnson, Ph. D., instructor in Political and Social Science, Harvard, published in the annals of the American Academy of Political and Social Sciences, the author says:

"The increase and extension of waterways aid the rail-
'roads through the increased travel which results from
'building up manufactures, developing trade, and pro-
'moting the growth of large cities. Take, for instance, the
'influence of that greatest of all inland waterways, the
'Great Lakes, on the growth of the passenger traffic in the
'States bordering the lakes. It has been, in large part, the
'improvement of the harbors and channels of the Great
'Lakes that has caused the phenomenal growth of Duluth,
'Milwaukee, Chicago, Detroit, Cleveland, Buffalo, etc. The
'railroads have not only aided the growth of these cities,
'but have in turn been greatly benefited through the devel-
'opment which has come to them by means of the improve-
'ments of the water route. Indeed the most important
'railroad systems of the United States are those which

"share in the commerce of the region round about the "Great Lakes.

"This fact reveals the true nature of the two agents of "commerce. They are complements of each other. When "the waterway and railroad are perpendicular, they feed "one another; when they run parallel, competition results "in reciprocal development of each—at least, will so result "when the waterway corresponds, as to dimensions and "equipment, to the commercial needs of the present, and "provides for the transportation of goods through compara- "tively long distances. The Rhine valley, as well as our "own lake region, furnishes an illustration of this truth. "The statistics of the traffic during the last forty years on "the Rhine river and on the railroads of the Rhine valley, "show that the growth of the transportation on each has "been about equally rapid. Neither of the two means of "communication has prevented the development of the "other."

At page 64 the author says:

"The two means of transportation do not perform the "same work, but services that are largely distinct and com- "plementary to each other."

"Not all the freight transported by water would be moved "by rail if the waterway did not exist. Canals, rivers and "lakes create a large share of their traffic. The cost of "transportation determines to a large extent the amount of "goods shipped. Cheaper rates give to existing categories "of freight a larger and wider market, and introduce into "commerce new articles, such, for instance, as sandstone, "straw, fertilizers and wood, which were formerly unable "to bear the costs of transportation. Again, the waterway "creates traffic for the railroads as well as for itself. It makes "raw materials cheaper, increases the number of those that "are available for use, and thus adds to the products of "agriculture and manufacture seeking transportation."

He then goes on to say:

"The statistics of the traffic of the railways and water- "ways at Frankfort-on-the-Main, before and after the canal- "ization of the Main from Mayence to Frankfort, show "in a striking way that an increase in water traffic may be "accompanied by an equal or greater rise in the traffic of "competing railroads."

He then reviews the statistics for three years before the canalization and for three years after, and these show a gain to the railroads of over 400,000 tons per year.

At pages 69, 70 he says:

"The general relation of waterways and railroads, as col- "lectors and distributors respectively, is shown by the ship-

"ment into and out of Paris by water and by rail in 1890. "The waterways brought to Paris 4,037,719 tons and the "railroads 5,826,548 tons, the percentage carried by each "being 41 per cent. and 59 per cent. respectively; but of "the freight from Paris which, of course, consisted mostly of "manufactured articles, the waterways carried only 953,834 "tons, while the railroads transported 2,335,252 tons, the "percentage being 29 per cent. and 71 per cent. respect-"ively."

There are many other important and interesting facts on this topic, but sufficient has been said to show that waterways in many respects are highly beneficial to railroads, and that the idea advanced in this and other similar cases that they are disastrous competitors is fallacious. In truth, this court has so held already.

THIS COURT ITSELF HAS CONCLUSIVELY DECIDED THAT RAILROADS ARE NOT AFFECTED BY "SLOW AND OLD-FASHIONED METHODS OF TRANSPORTATION."

In the "Import Rate case," Mr. Justice Shiras, speaking for the court, says (162 U. S., 210):

"Before we consider the phraseology of the statute it may "be well to advert to the causes which induced its enactment. "They chiefly grew out of the use of railroads as the prin-"cipal modern instrumentality of commerce. While ship-"pers of merchandise are under no legal necessity to use "railroads, they are so practically. *The demand for speedy "and prompt movement virtually forbids the employment of slow "and old-fashioned methods of transportation*, at least in the "case of the more valuable articles of traffic. At the same "time the immense outlay of money required to build and "maintain railroads and the necessity of resorting, in secur-"ing the rights of way, to the power of eminent domain in "effect disable individual merchants and shippers from "themselves providing such means of carriage. From the "very nature of the case, therefore, railroads are monopo-"lies" * * *

So, in the very latest case decided by this court, it was fully recognized that railroads are to a large extent unaffected by waterway competition by virtue of the commercial requirements of the times and from their superiority over old-fashioned methods of transportation. At least such is the just inference taken in connection with the import case.

In the Alabama Midland case (168 U. S., 167) this court refused to hold that the mere fact of competition is sufficient and positively laid it down that the "character and extent"

of the competition must be considered. The contention of the roads was overruled in this particular.

In the case of *I. Com. Com. v. East Tennessee, V. & G. R'y Co.* (85 F. R., 112) Judge Severens says:

"Without much regard to the matter of rates, the carriage "of freight by the navigation of such streams as the Cum- "berland has been almost entirely discontinued in recent "years. The delays, the hazards and uncertainties which "attend the navigation of such rivers have induced shippers "to greatly prefer and to rely upon transportation by rail."

In the *Trans Missouri* case, Mr. Justice Peckham, commenting upon the great industrial transitions of the times, speaks of "a change from canal-boats and stage-coaches to railroads." * * * (166 U. S., 323.)

It is thus clearly established that some competition is not effective against railroads, and that slow and old-fashioned methods of transportation do not prevent railroads from having a monopoly in respect, at least, of the more valuable articles of commerce, the exigencies of modern conditions demanding "speedy and prompt movement." It is apparent, therefore, that waterways, being "slow and old-fashioned," are not in truth competitors of railroads.

This view is fully borne out by statistics. We quote again from the Monograph of Professor Johnson at pages 40, 41:

"* * * It may be said that the freight that is actually "shipped on waterways will indicate clearly enough the "kinds of goods best adapted to water transportation. In "each case it will be seen that bulky raw materials consti- "tute the largest share of the kinds of raw materials depend- "ing on the industrial character of the regions about the "waterway. Of the tonnage on the Great Lakes in 1889, "27.96 per cent. was iron ore, 24.97 per cent. lumber, 22.24 "per cent. coal, and 12.39 per cent. grain; these four arti- "cles thus comprising 87.56 per cent. of all the freight. "The Ohio, the Rhine, and the Elbe may be taken as typi- "cal improved rivers. Out of a total of 5,528,857 tons "shipped in 1889, on the Ohio river above Cincinnati, 65,550 "tons were salt, 176,877 tons clay, sand and stone, 617,493 "forest products, and 4,338,421 tons were coal. The freight "forwarded from the ports of the Rhine is mostly coal, that "being 72.26 per cent.; wood constitutes 3.83 per cent., iron "ore 4.06 per cent.; salt about 1½ per cent.; hewed stone "and brick nearly the same share. The traffic on the Elbe, "upstream from Hamburg, consists of quite a different class "of raw materials. In 1889, 31 per cent. was grain, 10 per "cent. manure, 9 per cent. ores and metals, 5 per cent. pe- "troleum, and coal and wood, each about 4 per cent. The "character of canal freight is shown by shipments on the

"Erie canal, of which the products of the farm, the forest, "and the mine constitute 76 per cent. The freight on the "waterways at Berlin is mostly a barge traffic and affords a "good example of inland navigation on ways practically "artificial. Of the freight brought to Berlin in 1890, 49 "per cent. consisted of stone and brick, 21 per cent. of lime, "earth, sand, etc., 10 per cent. of wood, 7 per cent of coal, "and 6 per cent. of grain."

It is thus seen that when the "character and extent" of the traffic on waterways is considered, as it must be to properly gauge the competition, it consists almost wholly of heavy, cheap, bulky articles, and that manufactured valuable articles and the carriage of passengers naturally goes to the railroads at their own rates, unaffected by water competition.

At page 66 the author says:

"An important consideration and one that has not received "due attention, is that much of the freight taken from the "railroad for water transportation involves little or no real "net loss to the railway companies. Railroads, especially "the American, are doing an immense amount of business "which brings them little or no direct profit. Operating "expenses constitute a large share—sixty-seven per cent.— "of earnings, and this is because a great deal of bulky freight "is carried at a rate so low that the cost of operation often "includes ninety per cent. of earnings. Indeed it is asserted "that coal, coke, stone and iron ore are sometimes carried at "a loss by the railroads in order that by so doing they may "keep down the prices of crude products and thus sustain "industry and enlarge the volume of higher grades of traf- "fic. The operating expenses on the German railroads con- "stitute fifty-five per cent. of gross earnings. Were the "American railways to give over a good share of their bulky "freight to the waterways it would not materially reduce "their net profits. Grain is another article of transporta- "tion on which the railroads make only small profits. "Grain rates are much lower in America than Germany, "but local freight tariffs are much higher. American rail- "roads are making the local freight pay for the trouble of "handling grain at low profit.

"There are several advantages even which would flow to "the railroads from the surrender of a large share of this "bulky low-tariff freight. It would allow them to expand "the volume of fast freight and increase passenger traffic, "and this, too, by means of a proportionally less outlay of "capital." He then goes on to elaborate this fact.

It is clear from all this that railways and waterways fulfill different functions, mutually beneficial and helpful to each

other, and that they are not competitors, except to a limited extent. They do not clash or collide, because they revolve in different orbits and occupy different spheres in the complicated relations of modern life. The telegraph lines cannot be said to compete with railroads for the same reason. The eye is not the competitor of the ear, nor does it suffer loss because it cannot hear.

This concludes the discussion of water competition. We will now take up the subject of competition of market with market.

ALLEGED COMPETITION OF MARKET WITH MARKET DOES NOT AFFECT RATES.

There is, as we have seen, nothing but hearsay as to the alleged competing markets of Norfolk and Baltimore, and hence no competent evidence upon which to act. This court has held that only competent evidence is to be considered.

"The questions whether certain charges were reasonable "or otherwise; whether certain discriminations were due or "undue, were questions of fact to be passed upon by the "commission in the light of all the facts duly alleged and "supported by *competent evidence.*" * * * (Tex. & Pac. R'y Co. *vs.* I. Com. Com., 162 U. S., 197. Italics mine).

Not a single witness testifies that he has ever himself shipped, nor has he any personal knowledge of any shipment, from Baltimore or Norfolk. The most that we get from the testimony is that such shipments have been vaguely heard of. Four grain dealers out of five doing business in Charleston were examined, Kracke, Molony, Nathan, and Jones, and not one has said he ever shipped a bale of hay or a pound of grain from Norfolk or Baltimore; and as to New York, Boston, &c., it is proved by the road's own witness, Mr. Jackson, that the grain is first brought from the West to New York; that it is raised and grown and originates in the West (Trans., p. 63). There is not a syllable about a shipment from Paducah, Cairo, East Cairo, St. Louis, East St. Louis, &c.

The rates of transportation from these points to Charleston are given and nothing more. The prices of commodities in those markets are not mentioned, nor is there a word to show that they are large emporiums of trade in these articles; in fact, nothing at all of this sort is spoken of anywhere in the testimony. The record is absolutely silent as to whether or not these points enjoy an advantage in price over Memphis or other points.

It can hardly be possible that the railroads should expect any court to hold that the mere mention of the fact that the

freight rate from a certain point to another certain point is 23c. or 28c., as the case may be, proves that such a certain point is a market. We respectfully submit that no such inference can be drawn from such a solitary fact as a railroad tariff of 23c. or 28c.

We further submit that such evidence does not prove the additional element necessary for the railroad's contention, to wit, that it is a competing market.

As we have seen, the only thing stated in the evidence as to Cairo, Paducah, East St. Louis, &c., is the rate of 23c. and 28c. respectively (Trans., p. 59). There are many other places in this country which have a rate of 23c. and 28c. This is hardly enough to prove that such places are markets competing with Memphis for the trade of Charleston.

The mere production of a tariff sheet showing rates is an easy matter. There are numberless places that have rates. They also have birds and trees and things of that sort equally relevant and pertinent to prove that they are competing markets. The roads went a little further in the case of Chicago and proved by Mr. Molony that he made one shipment of grain from Chicago sixteen months prior to the hearing before the commission (Trans., pp. 75, 76).

But one swallow does not make a summer, and this solitary shipment is not sufficient to prove competition between market and market, such as affects rates.

The testimony as to prices in the various grain markets is very meager, but it so happens that the only testimony in the record proves that Memphis has a great advantage over other markets in price, and that hay is cheaper in Memphis by from $2 to $5 per ton; an average of $3.50 (Trans., p. 78). It is also in evidence that the dealers would buy in the cheapest market, even though freight rates were a little higher (Trans., p. 78).

So it is clearly established by the proofs that as far as market competition is concerned Memphis could stand a higher freight rate than the other places by reason of the cheapness of the price of the commodities in question, and that instead of market competition forcing her freight rates down the very reverse is true.

It is thus demonstrated that the finding of fact by the circuit court of appeals, concurring with the commission, that competition between market and market does not affect rates is sustained by the evidence, and is therefore unassailable.

By the preceding review and analysis of the testimony the finding of the court of appeals, concurring with the commission, that in this case, as a matter of fact, the transportation was done under substantially similar circum-

stances and conditions, is established as correct in every particular.

It has been clearly proved that the alleged competition by rail did not affect rates; that the water competition set up between Chicago and the North Atlantic ports was not such as to affect rates, and that the alleged competition between market and market did not affect rates.

As each case turns upon its own circumstances (168 U. S., 170), these findings of fact conclude the present controversy. Nevertheless we will take up the matters of law laid down by the court and the commission.

THE CONSTRUCTION OF THE FOURTH SECTION BY THE CIRCUIT COURT OF APPEALS.

At pages 131, 132, Trans., we find the Circuit Court of Appeals announcing the law as follows. See also 42 U. S. Appeals, 581:

"We adopt the conclusion heretofore announced by the "Interstate Commerce Commission, which is, in substance, "that in order to justify the greater charge for the shorter "distance because of water competition, the transportation "as to which such competition exists must be concerning "freight to the longer distance point, which, if not carried "to such point by the road giving the rate complained of, "could reach that point by water transportation; and also "that the competition of one transportation line cannot be "said to meet that of another for the carriage of traffic from "any particular locality, unless one line could perform the "service if the other did not. Such we believe to be the "true meaning of said fourth section, so far as the point we "are now considering is involved. We are also of opinion "that the competition claimed by the appellees to exist "between the different markets—particularly those of Mem-"phis, Chicago, and the North Atlantic ports—to supply "the trade of Charleston in the products mentioned, is not "in reality the competition that affects rates from a particu-"lar locality, but is one that is regulated by the commercial "circumstances existing at those points, applicable to busi-"ness of that character and not connected with the usual "conditions under which transportation is conducted, nor "does such competition in our judgment create the dissimi-"lar circumstances and conditions referred to in the fourth "section of the act now under consideration. And we fur-"ther hold that competition between carriers subject to the "requirements of said act does not produce such substantial

"dissimilarity in the circumstances and conditions under "which the transportation is performed, as will justify such "carriers in making a greater charge for the shorter than "for the longer haul, without an order to that effect from "the commission, granted by it as provided for in the pro- "viso to the fourth section.

"It is fair to presume that if the facts in any given "case justify departure from this rule, the commission will, "on a proper showing, grant the relief asked for, and make "such exceptions as the circumstances suggest as proper, "and justice to the carrier, as well as the shipper, demands. "If the carriers were permitted to determine such questions, "the conflicting results produced by opposing interests "would not only cause confusion, but work great injury "in many cases to the shippers, to localities, and also to "certain lines of business that would be affected thereby. "If the competition of markets, or of carrying lines, subject "to the provisions of the commerce act, justify carriers in "making greater short-haul and lower long-haul charges, "over the same line, without an order from the commission, "issued after due investigation, then the unjust rates for "transportation existing when that law was enacted, and "which it was intended should be prohibited by it, will "continue to be imposed and collected, and schedules shall "be made, announced and maintained, to the prejudice of "some localities and in favor of others, to the destruction "of some shippers and to the profit of others. This statute "was intended to prevent any and all kinds of discrimina- "tion in favor of localities, individuals or corporations, "and to put all shippers on the same footing—that of perfect "equality."

The first observation to be made on this branch of the case is that none of the assignments of error raise any of these questions specifically as required by the rules and decisions of this court, and consequently they are not open to review except at the option of this court.

Rule 35, Supreme Court.

An item of the decree below, which was not appealed from, is not before this court for consideration.

Harrison *vs.* Perea, 168 U. S., 311.

The rules, regulations, and restrictions are the same as to appeals as in cases of writs of error.

Farrar *vs.* Churchill, 135 U. S., 609.

When exception is too general this court will not review.

Halloway *vs.* Dunham, 170 U. S., 618.

An assignment of error which omits to show in what the error consisted or to specify in what part of the charge it occurred is insufficient.

Lucas *vs.* Brooks, 18 Wall., 456.

"Questions of importance were discussed at the bar, some "of which it cannot be admitted were properly presented. "Such questions only as are specified in the assignments of "errors, are, in general, to be regarded as open to the plain- "tiff and it is very doubtful whether an assignment that "the decision of the circuit court is for the wrong party is "sufficient to present any question for decision". * * *

Scholey *vs.* Rew, 23 Wall., 345.

Under these rulings and many others it is clear that an assignment of error must be definite, distinct, and specific.

The only error assigned in the case at bar relating to the fourth section of the act is as to "substantially similar circumstances and conditions." This is purely and solely a question of fact to be determined upon the circumstances in each case as we have seen, and an assignment directed to this subject solely raises no question of law.

Nevertheless, as a matter of prudence, we will discuss the questions of law.

COMPETITION MUST BE DIRECT AND IMMEDIATE. THE PROXIMATE CAUSE NOT COLLATERAL.

Taking these rulings up in their order, we address ourselves to the consideration of the first proposition, namely, that water competition must exist between the point of shipment and the point of destination as to freight that would go by the water line if the rail line did not reduce, and that it must be the same with rail lines competing with each other.

This is nothing more than an application of the familiar maxim *Causa proxima non remota spectatur.*

When this court laid it down in the Import Rate case and the Alabama Midland case that competition which affects rates is to be considered, it did not mean to overrule or nullify this maxim and allow the most remote circumstances having an indirect, incidental, and collateral effect on rates to be considered. The competition must be proximate, direct, immediate; it must be the dominant cause, the efficient cause, the *causa causans*, the proximate cause, to use the language of this court, where this doctrine has been discussed.

It was in full recognition of this universal rule that this court used the phrase "competition that affects rates should be considered." In truth, this question was clearly decided in the Import case, for the entire controversy in that case was as to freight which would have gone from its point of origin or shipment to its point of destination by a competing water route or by a competing rail and water route unless rates were reduced by the appellant, The Texas and Pacific Railway Company.

At page 205, 162 U. S., Mr. Justice Shiras says:

"The answer of the Texas and Pacific Railway Company "to the petition of the New York board of trade and trans- "portation before the Interstate Commerce Commission, and "the answer of said company to the petition of the commis- "sion filed in the circuit court, allege that rates for the trans- "portation of commodities from Liverpool and London, En- "gland, to San Francisco, California, are in effect fixed and "controlled by the competition of sailing vessels for the en- "tire distance; by steamships and sailing vessels in connec- "tion with railroads across the isthmus of Panama; by "steamships and sailing vessels from Europe to New Or- "leans, connecting there under through arrangements with "the Southern Pacific Company to San Francisco; that, un- "less the defendant company charges substantially the rates "specified in its answer, it would be prevented, by reason "of the competition aforesaid, from engaging in the carry- "ing and transportation of property and import traffic from "Liverpool and London to San Francisco, and would lose "the revenue derived by it therefrom, which is considerable, "and important and valuable to said company". * * *

At page 216, 162 U. S.:

"It alleged that in order to get this traffic it was necessary "to give through rates from the *places of shipment to the "places of final destination*, and that in fixing said rates it "was controlled by an ocean competition by sailing and "steam vessels by way of the Isthmus and around the Horn, "and also to some extent by a competition through the "Canada route to the Pacific coast." (Italics mine.)

At page 217, 162 U. S.:

"The defendant further alleged that unless it used said "means to get *such traffic the merchandize to the Pacific coast "would none of it* reach New Orleans, but *would go by the "other means of transportation*". * * * (Italics mine.)

Mr. Justice Shiras then goes on to review elaborately the cases, and as a conclusion from all the cases announces:

"That among the circumstances and conditions to be con- "sidered, as well in the case of traffic originating in foreign "ports as in the case of traffic originating within the limits

"of the United States, competition that affects rates should "be considered, and in deciding whether rates and charges "made at a low rate *to secure foreign freights which would "otherwise go by other competitive routes* are or are not undue "and unjust", &c. (162 U. S., 233, 234. Italics mine).

It is clear, then, that in this case the freight in question was such as would go by "other competitive routes" "from "the places of shipment to the places of final destination."

In other words, the competition was direct, immediate, proximate, and its effect on rates was direct, immediate, and proximate, and that was the competition this court said should be considered.

In the case at bar no competition was set up, either by rail or water, showing that freight originating at Memphis would be taken to Charleston by "other competitive routes "unless appellants lowered their rates." It was not established that this freight would be taken "from the places of "shipment to the places of final destination" by other lines unless rates were reduced to meet competition as to this freight.

And so in the Alabama Midland or "Troy case." At page 172, 168 U. S., this court quotes the language of the circuit court of appeals as follows: "And this water line "affects to a degree less or more all the shipments to or "from Montgomery from or to all the long-distance markets. "It would not take cotton *from Montgomery* to the South Atlan-"tic ports for export, but it would take the cotton *to the points "of its ultimate destination* if the railroad rates to foreign "marts through the Atlantic ports were not kept down to or "below the level of profitable carriage by water from Mont-"gomery through the port of Mobile." (Italics mine.)

Again, it is clear that the competition set up and considered in the Troy case was as to freight that would go by "other competitive routes" "from the places of shipment "to the places of final destination."

In the case at bar no water competition from Memphis to Charleston was set up in the pleadings, although counsel said he would amend his pleadings if this could be shown or abandon the point (Trans., p. 56).

No such amendment was ever made, and the attempt to prove such competition was a dismal failure, and the point was abandoned.

Therefore no water competition between the points of shipment and the points of destination is made out in this case, nor is there any competition by rail from the point of shipment to the point of destination, all the roads having agreed not to compete. In other words, this is the Social Circle case over again, and not the Troy case.

The necessity for the influence, being direct, immediate, and proximate, is well illustrated and conclusively settled by this court in the case of Hopkins *vs.* U. S., 171 U. S., 578, decided at this term. In that case this court said in construing the anti-trust law:

"There must be some direct and immediate effect upon "interstate commerce in order to come within the act. The "State may levy a tax upon the earnings of a commission "merchant which were realized out of the sales of property "belonging to non-residents, and such a tax is not one upon "interstate commerce because it affects it only incidentally "and remotely although certainly *Ficklen vs. Shelby County* "*Taxing District*, 145 U. S. 1"; (171 U. S., 592).

At pages 593, 594, 171 U. S., Mr. Justice Peckham goes on to say:

"Suppose the railroad company which transports the "cattle, itself furnishes the facilities, and that its charges for "transportation are enhanced because of an agreement "among the land-owners along the line not to lease their "lands to the company for such purposes for less than a "named sum, could it be successfully contended that an "agreement of the land-owners among themselves would be "a violation of the act as being in restraint of trade or com- "merce? Would an agreement between builders of cattle "cars not to build them under a certain price be void be- "cause the effect might be to increase the price of transpor- "tation of cattle between the States? * * * Would an "agreement among themselves by locomotive engineers, "firemen or trainmen engaged in the service of an interstate "railroad not to work for less than a certain named com- "pensation be illegal because the cost of transporting inter- "state freight would be thereby enhanced? Agreements "similar to these might be indefinitely suggested.

"In our opinion all these queries should be answered in "the negative. The indirect effect of the agreements men- "tioned might be to enhance the cost of marketing the "cattle, but the agreements themselves would not necessarily "for that reason be in restraint of interstate trade or com- "merce. * * * An agreement may in a variety of ways "affect interstate commerce, just as State legislation may, "and yet, like it be entirely valid, because the interference "produced by the agreement or by the legislation is not "direct (*Sherlock vs. Alling*, 93 U. S., 99–103; *United States* "*vs. E. C. Knight Company*, 156 U. S., 1, 16; *Pittsburgh & South-* "*ern Coal Co. vs. Louisiana*, 156 U. S., 590, 597; *Transportation* "*Company vs. Parkersburg*, 107 U. S., 691; *Ficklen vs. Shelby* "*County, supra.*")

It is clear, then, that direct effects and proximate causes

only will be considered in construing the laws, the fourth section of the act to regulate commerce as well as the anti-trust law, and that there has been no abrogation of the maxim *Causa proxima non remota spectatur.*

It would, indeed, be a novel doctrine if the contrary were true, and that competition in the most distant parts of the world is to be considered in reference to freight from the remotest regions of the earth.

If this be so, however, is there a limit to it, and who is to judge when this limit is reached?

Buenos Ayres, at the mouth of the Rio de la Plata, in the Argentine Republic, is a port which ships large quantities of grain. It is over 6,000 miles from Charleston, but why not say that these roads in the case at bar are entitled to charge double the rate now in force to Summerville because Mr. Molony can get a schooner rate of 2 cents a bushel on Buenos Ayres wheat. He need not testify that he does it, for in his Chicago shipment he refuses to go that far; he only says he can do it.

This being allowed, why not permit the present rate to Summerville to be trebled in order to make up for the loss sustained by the roads because Mr. Molony has discovered that he can get a 1-cent rate on California wheat brought around the Horn to Charleston?

And after that, if he discovers that he can get a still less rate from Australia, may not that be a good reason for quadrupling the present Summerville rate?

Then, when this is done, we still have the case of India to provide for, in the event that he can get rates from that point, and still there remains Russia, "in the lowest deep, a lower deep."

We respectfully submit, therefore, that the ruling of the circuit court of appeals on this point is correct. This brings us to market competition.

COMPETITION OF MARKET WITH MARKET.

In the Social Circle case the roads claimed that they had the right to practically adjust the differences in price between buggies made in Baltimore and those made in Cincinnati by arranging the freight rates to Augusta, the common market, so as to put the Baltimore manufacturer and the Cincinnati manufacturer on an equal footing. The Interstate Commerce Commission held that it was not the province of the roads "to adjust trade relations and equalize "commercial conditions" (James & Mayer Buggy Co. *vs.* Cinn., N. O. & T. R. R., 4 I. C. C. Rep., 744). This court affirmed the conclusions of the commission.

Suppose by means of some invention the Baltimore maker were able to produce a carriage at one-third the cost that the Cincinnati man could do it, would the roads have the right to neutralize this advantage in the Augusta market or any other market by increasing freight rates from Baltimore or lowering them to Cincinnati? Upon what principle could they assume such a right? Yet that is the contention here. The inherent vice of the position is strikingly exhibited in connection with the facts of the case at bar. Memphis has an advantage of $3.50 per ton in price on hay over New York and other eastern markets (Trans., p. 78). Can the roads nullify this by imposing high rates from Memphis or giving low rates from New York? If so, they could drive the farmer out of business at any point.

For when we begin to consider that if the roads are allowed to carry wheat to Charleston, say, in order to build up the western farmer by putting his product in that market so as to meet the wheat of the Maine farmer on equal or better terms, they may not stop at Charleston; but, having driven the Maine man out of Charleston, the roads may carry the western product to New York and drive the Maine man out of that market. After that they can pursue him to Boston, and finally to Maine itself, and drive him out of business even there.

This, of course, will build up the business of the West and foster western enterprises. But the Supreme Court has said:

"It is no proper business of a common carrier to foster particular enterprises or to build up new industries."

U. P. R. R. *vs.* Goodridge, 149 U. S., 690.

Unquestionably, then, if there is any force at all in the position of competition of market with market and product with product, it is pre-eminently a matter for the regulating authority to prescribe the limits to which a public carrier may go, and it is not a subject to be left in the hands of the roads.

We think the Supreme Court has decided this, not only in the Social Circle case, but also in the Goodridge case, 149 U. S., 690. This court says:

"This act (a Colorado statute) was intended to apply to "infra-state traffic, the same wholesome rules and regula- "tions which Congress two years thereafter applied to com- "merce between the States, and to cut up by the roots the "entire system of rebates and discriminations in favor of "particular localities, special enterprises, or favored corpo- "rations, and to put all shippers on an absolute equality, "saving only a power, not in the railroad company itself, "but in the commissioner, to except 'special cases designed

" to promote the development of the resources of this State,' " and not to prevent the commissioner 'from making a " lower rate per ton per mile in car-load lots than shall " govern shipments in less quantities than car-load lots, " and from making lower rates for lots of less than five car- " loads than for single car-load lots.' The statute recognizes " the fact that it is no proper business of a common carrier " to foster particular enterprises or to build up new indus- " tries; but, deriving its franchise from the legislature and " depending upon the will of the people for its very exist- " ence, it is bound to deal fairly with the public, to extend " them reasonable facilities for the transportation of their " persons and property, and to put all its patrons upon an " absolute equality."

It is clear, then, that the prices and quality of articles must be given their full play, and it is not any proper business of a common carrier to interfere with their operation; nor should they interfere with the ingenuity or energy of individuals whose skill and inventive genius or business ability gives them advantages.

It is not their province to "equalize trade relations and adjust commercial conditions."

Such is the decision of this court in the Goodridge case and the Social Circle case, and the Circuit Court of Appeals was correct in following these rulings.

Moreover, competition of market with market is too remote a cause to be taken into account under the cases heretofore cited.

We now come to the question of carriers subject to the act.

This ruling does not in any way affect or concern the totally different and distinct principle as to what the traffic will bear, which is a question that operates universally on all lines and must be and is determined with reference to the articles offered for transportation on those lines.

Counsel for the roads seeks to confuse the two ideas; hence we quote Judge Cooley on the point.

At page 66, *In re* L. & N. R. R. Co., 1 I. C. C. R, he says: "This is a just and sound principle when justly applied."

* * *

"But the cases must be very rare in which the larger " charge in the aggregate for the shorter haul of the same " kind of property over the same line in the same direction " could be justified, when no other reason supported it than " the fact that the traffic for the longer haul would bear no " more. Manifestly such a discrimination when not im- " perative on other grounds is unjust; and the injustice be- " comes oppression when the effect is to increase the burden

"upon the traffic which has the shorter haul. There is a "plain limit to the application of the principle that prop- "erty is to be carried at rates it will bear, and the limit is "reached when the rates charged are so low that further re- "duction would necessitate an increase of the charges upon "other traffic in order to make up to the carrier such loss "as the reduction causes. If some common vegetable, worth "but five cents a hundred pounds more at a market a thou- "sand miles distant than it is where it is grown, were to be "transported that distance for the sum named, the producer "nearer the market, if subjected to a high charge, would "have a right to complain that not only did the discrim- "ination reduce the market value of his produce, but that "the acceptance of the unreasonably low rates from the dis- "tant producer had a tendency to increase the charge for "the shorter haul, so as to make it not only relatively, but, "when considered by itself, unreasonably high."

COMPETITION BETWEEN CARRIER AND CARRIER SUBJECT TO THE ACT.

It must be confessed that the ruling of the circuit court of appeals in the case at bar and the ruling of this court in the "Troy case" on this point of carrier and carrier subject to the act seem at first sight not to be in accord.

Counsel for appellee therefore without hesitation states that he is not presumptuous enough to suggest that this court should rehear the matter, and this notwithstanding the fact that this court seems to invite something of the sort by the following statement in its opinion: "The "first observation that occurs on this proposition is that "there appears to be no allegation in the bill or petition "raising such an issue," 168 U. S., 168, and further on proceeds to show that the appeal court below was reversed in the Import case because its decision went off on an "issue that was not actually before the court," thus, perhaps, intimating that its ruling on this question of carrier and carrier subject to the act might be regarded as an *obiter dictum*.

However this may be, counsel for appellee feels that it would come with little grace from one so insignificant as himself to suggest to the most august tribunal in the world that it had misinterpreted or misapplied some decision or overlooked some important principle having a bearing on the subject, the usual course, as Mr. Justice Peckham says in the Joint Traffic case, where a rehearing is sought, and he frankly admits that he has not the courage to make such a suggestion.

Nevertheless, he feels that it can hardly be possible that so able a jurist as Judge Goff, after giving this case the consideration it received, holding it up for eighteen months before decision and refusing a rehearing after he had seen the opinion of this court in the Troy case, could have entertained views diametrically opposed to those of this court, and it may be that if the opinion of Judge Goff is properly understood and the opinion of Mr. Justice Shiras is properly understood, all conflict on this point will be seen to be more apparent than real, and that the fault lies in the miscomprehension of those who read these two opinions.

It may be proper, then, to show how Judge Goff's opinion came about, merely by way of explanation, and not by way of re-argument, for if it should develop that precisely the same question was not passed upon in both courts, the apparent conflict would vanish. And this is the very thing that has happened.

Mr. Justice Shiras says:

"The claim now made for the commission is that the "only body which has the power to relieve railroad compa- "nies from the operation of the long and short haul clause "on account of competition, or any other similar element "which would make its application unfair, is the commis- "sion itself, which is bound to consider the question upon "application by the railroad company, but whose decision "is discretionary and unreviewable" (168 U.S., 168; Trans., pp. 147, 148).

No such question was discussed before the Circuit Court of Appeals, and no such claim was made. On the contrary, it was strenuously argued against the contention of the railroads that it was the duty of the court to decide the matter for itself on all the facts as a court of equity; and the Appeal Court did this, and so far is in full accord with this court in the Troy case.

It was also pressed upon the Court of Appeals that "competition that affects rates" could be considered and ought to be considered, and the court was asked to consider all the competition set up by the roads of every kind and description whatever, and it did consider same and pass upon it.

It was also urged upon the Court of Appeals by appellee here, who was appellant below, that the mere fact of competition was not sufficient without regard to its kind or force to exempt the carrier from compliance with the fourth section, and the court so held, being thus in accord with this court.

It was also argued before the Appeal Court that, in view of the fact that the character and extent of competition must

be considered, there would necessarily arise three classes of cases, and circumstances of three classes:

1. Obviously similar circumstances.
2. Obviously dissimilar circumstances.
3. Doubtful circumstances.

In the case of class 1 the fourth section applied and the roads could only be relieved under the proviso by applying to the commission.

In the case of class 2, *ipso facto*, they were relieved without permission of anybody.

In the case of class 3 they might or might not require an exoneratur from the commission.

It was pointed out that this was the construction placed upon the act by Judge Pardee.

In Missouri Pac. R. Co. *vs.* Texas and P. R. Co., 31 F. R., 862, Judge Pardee says:

"Under section 4 of the interstate commerce law, relat-
"ing to the charges for the long and short haul, it seems
"that where the circumstances and conditions are dissimilar
"there is no prohibition; where the circumstances and con-
"ditions are similar, the prohibition attaches; and that
"where it is difficult to point out clearly the circumstances
"or conditions which produce dissimilarity, the doubt should
"go in favor of the object of the law, and the circumstances
"and conditions should be taken as substantially similar.
"Where the circumstances and conditions are similar, or
"substantially similar, and the result to the carrier is inju-
"rious, relief can be had only through the commission."

That this was also the construction put upon the statute by Judge Cooley *In re Louisville and Nashville R. R. Co.* (1 I. C. C. Rep., 77) and by the commission in Geo. Comm. *vs.* Clyde Co. *et al.* (5 I. C. C. Rep., pp. 328–414, inclusive).

That Judge Cooley's opinion must be read as a whole and its meaning must not be gathered from separate extracts and sentences taken apart from their context, and thus read it would be found that this construction had been placed upon the statute from the very first, and all the opinions of the commission were in harmony.

That the meaning of the law and the true meaning of the commission's decisions from first to last was, as pointed out by Judge Pardee, that there might be cases where the circumstances were clearly similar, that there might be cases where they were clearly dissimilar, and that there might be cases where they were *prima facie* similar, because doubtful, the doubt being solved in favor of the law.

Where the circumstances are similar or *prima facie* similar application must be made to the commission under the proviso.

It was never for a moment urged upon Judge Goff that under substantially dissimilar circumstances the commission must be applied to. Hence he did not pass upon the same question set forth by Mr. Justice Shiras, who says:

"The proposition comes to this, that when the circum-'stances and conditions are substantially dissimilar, the "railway companies can only avail themselves of such a "situation by an application to the commission" (168 U. S., 144).

The question before Judge Goff does not seem to have been made before this court in the Alabama Midland case. Hence there is no conflict.

This court does not discuss in its opinion doubtful cases at all. It does not expressly hold that there are no doubtful cases, nor does it decide that if circumstances are not similar they must necessarily be dissimilar. That there can be only two classes of circumstances is not distinctly laid down. Room is left to harmonize all those decisions such as Judge Pardee's, which recognize three classes of circumstances. And Judge Goff's opinion is one of these. It may be that this court will itself say that it is possible for cases to arise where it is difficult and doubtful to determine whether the circumstances are similar or dissimilar.

The question of recognizing such a category has not yet been before this court. It now arises.

If this court should decide that there is such a class, and we venture to believe that it will, then the further question arises, What cases are to be put in that class?

The first question never having been before this court, this incidental question obviously has not been before it, and is *res integra* here.

It is true and not disputed that competition of railroads subject to the act may in some cases create substantially dissimilar circumstances and conditions, and if this appears on investigation by the commission upon application under the proviso or when the roads are brought before the courts not having made application, they are relieved *ipso facto* from the restraints of the fourth section. This proposition was not controverted before Judge Goff. This, we submit, is the full extent of the decision on this point of this court in the Alabama Midland case, this court expressly going out of its way "to guard against any misapprehension" of its decision by confining its operation to "some cases," not "all cases," thus clearly indicating that the case then before it was the exception and not the rule.

This court has not decided nor does it seem to have directed its attention to the totally different question, namely, as a general rule, does competition between roads

subject to the act create and constitute *prima facie* similar or dissimilar circumstances? Are the circumstances of such competition obviously and clearly dissimilar or is that a matter of doubt and difficulty to be solved in favor of the object of the law? Does such competition on its face create a solid, substantial difference of conditions?

This was the question presented to the circuit court of appeals.

With the utmost deference we submit that it is not the same question that was presented here. As the Latins say, it is *similis ergo non eadem.*

At any rate, believing that it was not the same question, for we would not reargue it if we thought so, we earnestly urge that competition between roads subject to the act does not *prima facie* constitute dissimilar circumstances as a general rule.

When competition exists between roads subject to the act the presumption is that the law is obeyed by both roads; that they meet on equal terms, and that *prima facie* the circumstances and conditions are substantially similar.

Suppose two roads run from Chicago to New York, both compete for traffic between those points, but before they can do so they must comply with the law. On through business neither can charge more to intermediate stations than the aggregate between Chicago and New York. So the result is that neither road can collect out of intermediate traffic the sinews of war to enable it to reduce the rates on competitive traffic below zero.

As a matter of fact, the roads between Chicago and New York have placed this construction on the act from the first, and their rates do not violate the fourth section (Trans., pp. 88, 89.)

It is familiar history that in strife for traffic the roads have frequently carried far below cost and made up the loss on intermediate freight, and this was one of the evils against which the commerce act was directed.

The roads subject to the act are, in the eye of the law, all on equal terms, governed by the same rules, and bound to conduct their business under the same regulations; so the presumption is that the circumstances and conditions are substantially similar. There is no obvious dissimilarity. But should a case arise where one road has the shortest and most direct line to New York, say, and its co npetitor has a long, circuitous route, the short line makes the price and the long line must meet it. If this can be done by the long line without violating the fourth section, well and good, but should it turn out that the disadvantage of the long line is so great that it cannot meet the competitive prices of the

short line without making some or all of its intermediate rates greater than its through rates, then the question would arise whether this could be done with justice to the intermediate points. For if the competitive business were carried at a loss, and the object of raising the intermediate rates were to make up for that loss, then this would be an injustice which the law could not permit. It is not such competition "as having due regard to the interests of the public "and of the carrier, ought justly to have effect upon the rates," to use the language of Mr. Justice Shiras in the Troy case.

There might arise a hundred other questions, but this illustration shows that, as between carrier and carrier subject to the act, the mere fact of competition does not make out plainly dissimilar circumstances.

Take the case at bar. Competition between the Port Royal and Augusta via the Charleston and Savannah road to Charleston is set up by the South Carolina road as a clearly dissimilar circumstance.

Both lines run from Augusta to Charleston, and one is only 10 miles longer than the other. Both pass through South Carolina—that is, the same State. Every condition of climate, population, and volume of business is the same; the character of the country is the same; in fact, there is no difference except that one is 10 miles longer than the other. Why should one disobey the fourth section, then, and not the other, or why should both disobey the statute? If both were required to obey the law, where would there be any hardship? Could they not compete for the business of Charleston in a lawful manner as well as in an unlawful one? If both were compelled to put such intermediate rates in force as were not greater than the through rate, where would one have any advantage over the other? Would they not both be on precisely equal terms and neither at a disadvantage?

Of course, if it should appear that one road had to keep up expensive trestles through swamps, or for some other good reason could not comply with the law without sustaining injury, then the commission could give relief. But to say that the mere fact of two roads running between Augusta and Charleston is so clearly a dissimilar circumstance that without application to the commission both are at liberty to violate the law is something we cannot concede.

We prefer to believe that Congress knew that sometimes two and sometimes more than two lines ran from one city to the other in this country. And that fact alone could not exempt the two or more lines from the operation of the law on the ground that it was a strange and dissimilar circumstance. On the contrary it strikes us that this condition of

affairs is common, prevalent, and most monotonously similar all over the country.

"Congress must have intended something unusual and "peculiar, out of the ordinary course of business, as that "which would create a substantial dissimilarity; otherwise "the vast bulk of transportation would not be subject to the "rule at all" (I. C. C. *vs.* E. T., V. & G. R'y, 85 F. R., 107).

It seems to us, therefore, that in the case of carriers subject to the act the circumstances and conditions are on their face, instead of being dissimilar, so much alike that relief must be sought under the proviso.

It would be a curious result, indeed, if the law should operate where there was one road between two points, but that the moment a second line was built between those points the law is abrogated *ipso facto*, and we respectfully submit that this is not the decision of this court in the Alabama Midland case. That decision, like all others, must be read in the light of the facts of that case. Those facts established effective competition beyond doubt, and the language of the court, when thus read in its application to the facts of the case, precludes the possibility of putting any such meaning upon the opinion.

Indeed, it would be imputing a strange doctrine to this court to so interpret its decision, for it is well known that a number of railroads centering at a place does not necessarily imply competition between them. In fact, there is a case now pending where the shorter distance point has more railroads than the longer distance point, and yet they do not compete. At page 116, 85 F. R., the court says:

"Chattanooga, too, has more railroads. They might com-"pete if they would. They do not think it to their interest "to do so."

This court has not nullified the fourth section nor has it excluded the proviso from any field of operation. This clearly appears when the Alabama Midland decision is considered in connection with previous decisions of this court. It has not overruled the canons of interpretation laid down by Chief Justice Marshall, who said:

"It is a rule of construction, acknowledged by all, that "the exceptions from a power mark its extent, for it would 'be absurd, as well as useless, to except from a granted "power that which was not granted—that which the words "of the grant could not comprehend" (Gibbons *vs.* Ogden, 9 Wheat., 191).

So we say here it would be absurd and useless to clothe the commission with power to exempt from the general rule if the general rule did not apply. The *extent* of the general rule is marked by the exception, and, unless it be

obvious and clear that the general rule has no application, the commission must be applied to, and it can grant an exemption only after an investigation and after it has found that the case is special. Wherever there is doubt, then, as to whether the transportation is of the "like kind of property" or "over the same line" or "under substantially similar circumstances and conditions," there must be a consideration of the facts of the particular case by the commission.

This reasoning is fully sustained by language of the Supreme Court in the Import Rate case:

"The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that in deciding whether differences in charges in given cases were or were not unjust there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the kinds of traffic were 'like,' whether the transportation was effected under 'substantially similar circumstances and conditions.' To answer such questions in any case coming before the commission *requires an investigation into the facts*" * * * (162 U. S., 219). (Italics mine.)

If an investigation is *implied* in the second section, what are we to think when we find it expressly provided for in the fourth section?

Are we to take the view of the roads that it is not necessary and no application to the commission is ever to be made?

This construction of the proviso was made by the commission in the Social Circle case, "whose conclusions have been accepted and approved by the circuit court of appeals, and we find nothing in the record to make it our duty to draw a different conclusion" (162 U. S., 194), to use the words of Mr. Justice Shiras.

None of these cases were overruled or modified in the Alabama Midland decision. On the contrary, they were all reaffirmed and relied on by this court, and there is no want of harmony between the Alabama Midland case and any of these decisions; nor is there any conflict, as we have pointed out, between Judge Goff's opinion, following the previous rulings of this court, and the Troy case. The question of *prima facie* similarity or *prima facie* dissimilarity was not touched upon by this court, and that was the issue before Judge Goff.

Indeed, as this court has adopted and approved Judge Cooley's construction of the fourth section in the case of *In re L. & N. Petition*, 1 *I. C. C. R.*, 53, and as the Circuit Court of Appeals in the case at bar has done the same thing, it

would be quite remarkable if any real conflict of views resulted between the two courts.

An examination of Judge Cooley's rulings will clearly show that this has not occurred, and that the apparent dissonance arises from the fact that Judge Goff adopted the general rule laid down by Judge Cooley, the case at bar being one to which said general rule is applicable, and that, on the other hand, this court in the Alabama Midland decision adopted the rule laid down by Judge Cooley for "clearly exceptional cases," the Alabama Midland case being one of that sort.

Judge Cooly, *In re* L. & N. R. R., 1 I. C. C. R., 53, states that Congress laid down a general rule in the fourth section forbidding a greater charge for the long haul than for the short haul, and then proceeded to authorize exceptions conferring certain powers with reference thereto on the commission. This eminent jurist then goes on to say:

"From the first there have been two opinions regarding "the proper construction of this provision for exceptions; one "view that no exception can be lawful unless made with "the sanction of the commission; and the other, apparently "better supported on the words of the statute, that an order "of relief is not required when the circumstances and con- "ditions are substantially dissimilar, since the carrier, in act- "ing upon them would commit no breach of law, though it "would be responsible in case it were found that the cir- "cumstances and conditions were misconceived or misjudged. "Under this last view the order for relief would be needful "only when the case was not one of *plainly dissimilar cir- "cumstances and conditions*, but in which nevertheless, there "might be reasons and equities that would sanction such "greater charge." (Italics mine.)

At page 57 he says:

"We have listened, with an earnest desire to reach a just "conclusion, to all the arguments presented on the construc- "tion of the statute, by those appearing either to advocate "or to oppose the applications, and after mature considera- "tion we are satisfied that the statute does not require that "the commission shall prescribe *in every instance* the *excep- "tional case*, and grant its order for relief before the carrier "is at liberty in its tariffs to depart from the general rule. "The terms of the statute clearly lead to the opposite con- "clusion. It declares: 'It shall be unlawful for any com- "mon carrier subject to the provisions of this act to charge "or receive any greater compensation in the aggregate for "the transportation of passengers or of like kind of property "under substantially similar circumstances and conditions "for a shorter than for a longer distance over the same line

"in the same direction, the shorter being included in the "longer distance.' Here we have clearly stated what is "unlawful and forbidden; and for doing the unlawful and "forbidden act penalties are there provided. But that "which the act does not declare unlawful must remain law- "ful if it was so before, and that which it fails to forbid the "carrier is left at liberty to do without permission of any "one. The charging or receiving the greater compensation "for the shorter than for the longer haul is seen to be for- "bidden only when both are under substantially similar "circumstances and conditions; and therefore, if in any "case the carrier, without first obtaining an order of relief, "shall depart from the general rule, its doing so will not "alone convict it of illegality, since if the circumstances and "conditions of the two hauls are dissimilar the statute is "not violated. Should an interested party dispute that the "action of the carrier was warranted, an issue would be "presented for adjudication, and the risks of that adjudica- "tion the carrier would necessarily assume. The later "clause in the same section, which empowers the commis- "sion to make orders for relief in its discretion, does not in "doing so restrict it to a finding of circumstances and con- "ditions strictly dissimilar, but seems intended to give a "discretionary authority for cases that could *not be well in- "dicated in advance by general designation*, while the cases "which upon their facts should be acted upon as *clearly "exceptional* would be left for adjudication when the action "of the carrier was challenged. The statute becomes on "this construction practical, and this section may be enforced "without serious embarrassment."

It was urged upon the attention of Judge Goff that while Judge Cooley had very properly rejected the view that "no exception can be lawful unless made with the sanction of the commission," and had laid it down that the railroads could judge for themselves in some cases, yet he had not ruled that they might do this in all cases, but had distinctly confined their right to relieve themselves from the operation of the general rule, on their own motion, to cases "of *plainly* dissimilar circumstances and conditions," and to cases where the facts were "*clearly exceptional.*"

The attention of the Circuit Court of Appeals was further called to the fact that after Judge Cooley had thus construed the statute he proceeded to designate cases that were "clearly exceptional" and "plainly dissimilar" and cases that were not, and also doubtful cases. Amongst many other things he discusses five different classes of cases growing out of competition; and at page 81 says:

"3. The competition with each other of the railroads

"which are subject to the Federal law can seldom, as we "think, make out a case of dissimilar circumstances and "conditions within the meaning of the statute, because it "must be seldom that it would be reasonable for their com- "petition at points of contact to be pressed to an extent that "would create the disparity of rates on their lines which "the statute seeks to prevent. But we cannot now assume "that no case has arisen or can hereafter arise, which, on "its own peculiar facts, and in consideration of its special "equities, can be deemed to present a just claim under the "statute."

Continuing on the same theme, at page 83 he says:

"We do not pass upon those cases finally at this time, "and therefore do not undertake to say of them that they "constitute cases in which the competition of roads subject "to the Federal law creates the dissimilar circumstances and "conditions which make up *an exceptional case.* But this "brief reference to the facts is suggestive of a possibility at "least that the *exceptional case* may exist." * * *

It is clear beyond cavil, then, that by Judge Cooley's ruling the roads could only judge for themselves in "*clearly exceptional*" cases, in cases of "*plainly dissimilar circum- "stances and conditions,*" and that competition between carrier and carrier, subject to the act, as a general rule, would not constitute a "clearly exceptional" case, although there was a possibility that such a case might exist.

The roads would now have us believe, in spite of this distinct announcement made by Judge Cooley in an opinion adopted and approved by this court, that in every instance where it can be proved that two or more roads run between different cities in the United States that this is an "exceptional case," a strange, unusual, peculiar, and substantially dissimilar circumstance. They insist that such is the meaning of this court in the Alabama Midland case, in spite of the fact that Mr. Justice Shiras went out of his way "to "guard against any misapprehension of the scope" of the decision of this court, and expressly confined its operation to "some cases," not "all cases," and said, in the most guarded language:

"The competition may in *some cases* be such, as having "due regard to the interests of the public and of the carrier, "ought justly to have effect upon rates, and in *such cases* "there is no absolute rule which prevents the commission or "the courts from taking that matter into consideration." (168 U. S., 167. Italics mine.)

Thus clearly indicating that this court had in mind only "exceptional cases" like the one before it in which effective

competition had created beyond doubt substantial dissimilarity.

Hence we respectfully submit that on this question of law as to carrier and carrier there is actually no want of consonance in the two opinions, for while the supreme court was dealing with an "exceptional case," the circuit court of appeals was dealing with one that came within the general rule, both courts applying in the respective cases Judge Cooley's construction of the fourth section, which construction both courts approved and adopted.

However, should this court decline to approve the general rule laid down by the circuit court of appeals, it will not be interfered with in this case, for as applied to the particular facts appearing it is correct, it having been found that the conditions were substantially similar, as matter of fact. A ruling by the court below when applied to the facts of the case is sustained without regard to its correctness as a general proposition.

Spalding *vs.* Castro, 153 U. S., 38.
Evanston *vs.* Gunn, 99 U. S., 160.

CIRCUIT COURT OF APPEALS WILL NOT BE REVERSED FOR BASING JUST JUDGMENT ON WRONG REASON.

It is settled law that no judgment shall be reversed when it is clear that the error did not prejudice the rights of the party against whom the ruling was made, and that it worked no injury.

Lancaster *vs.* Collins, 115 U. S., 222.
Smith *vs.* Shoemaker, 17 Wall., 630.
Bank of Decatur *vs.* Home Savings Bank, 21 Wall., 294.
Lyons *vs.* Phelps, 156 U. S., 202.

A just judgment, which is warranted by the record, will not be reversed because it was based on a wrong reason.

Smiley *vs.* Barker, 83 F. R., 684, C. C. A., heard before Mr. Justice Brewer and Judges Sanborn and Thayer.

Under these authorities and this well-established principle, it is clear that even if this court should hold that Judge Goff was wrong as a matter of law, it is plain that the roads were not prejudiced.

For in the language of Mr. Justice Shiras in the Alabama Midland case:

"It was not claimed that the defendants were precluded

"from showing in the courts that the difference of rates "complained of was justified by dissimilarity of circum- "stances and conditions by reason of not having applied to "the commission to be relieved from the operation of the "fourth section." 168 U. S., 168.

On the contrary, this defence of carrier competing with carrier was fully considered by the circuit court of appeals, and as a matter of fact the court held that the competition set up did not affect rates.

In a previous part of this brief we have shown that the evidence fully sustained this finding of fact (see pp. 24–28).

In compliance with the rulings of this court in the Import case, this entire subject of competition that affects rates of every kind and sort set up, was fully and elaborately discussed at the bar and most carefully and conscientiously considered by the court of appeals, as has been already shown herein. Hence no injury whatever has been done to the appellants by these rulings on the law of this case, and this court will not reverse even should they be considered erroneous rulings, for the judgment of the circuit court of appeals is just.

This question has been expressly and specifically passed upon since the decision of this court in the Alabama Midland case.

In the case of I. C. C. *vs.* E. T., V. & G. R'y *et al.*, 85 F. R., 107, Judge Severens says:

"In the present case the commission put its order upon "the ground that the defendant had not the right, in view "of the fact that no previous authority had been given by "the commission to exercise that privilege, to depart from "the rule against charging more for a short than a long "haul because of a different condition arising from the com- "petition at Nashville by other carriers, part of whom were "railroad companies engaged in through traffic with the "East. In this undoubtedly it was in error. The contrary "doctrine is now well established. But this error is not "material. The legal reason may be wrong and the order "right if upon the facts the latter should be found by the "court to be warranted by law. Nor would it affect the "duty of the court if the commission had founded its order "upon one provision of the act and the facts brought the "case within some other. The question is whether the order "made was a lawful one in the circumstances as they are "made to appear."

THE LONG HAUL AND THE LONG LINES.

It may be proper to make a few general observations on the "long haul" and the "long lines," as they are at the bottom of this controversy.

Mr. A. B. Stickney, himself a president of a large western railroad, a heavy owner of railroad property, a man of many years experience in railways, and a leading light in the railroad world, in a very able book called "The Railway Problem," says, at page 52 thereof:

"It seems impossible that any set of men should become "so befogged by a form of words as to suppose that it was "possible for a railway to haul a ton of freight five hundred "miles at substantially the same price as for hauling it two "hundred miles, yet a reference to the tariffs of these rail-"ways would tend to show that such is the fact.

"This long-haul policy has done, and is now doing, great "mischief to the corporations as well as the people."

At page 86 of his book he quotes General D. M. Dodge, president of the Denver City and Fort Worth railway and a director in the Union Pacific railway, as saying:

"To my certain knowledge, the Union Pacific road, of "which I am a director, is doing a large amount of its "business now as competitive business at a loss, and they "have not the nerve to stand up and refuse it, because they "are fearful that some other road will get it, and I know "today that there is a large demand upon their road for "every car they have got, to do a paying business."

In his brief in the court below counsel for the roads went into a disquisition upon the long line being at the mercy of the short line, and the injustice of making it reduce its intermediate rates.

We are informed that in the argument of the *Social Circle case* Mr. Justice Brown asked from the bench, when this view was presented, if the short line was not the natural channel for traffic.

If a short line is not allowed to have any advantage over a long line, what incentive will capital have to build one, and would not competition be thus discouraged and retarded?

Is it not one of the present well-known evils that the railroads, in order now to get the longest haul, take traffic by a circuitous route to far distant points, ignoring the natural outlet?

Is not cotton taken from Columbia hundreds of miles to Norfolk instead of being exported from Charleston, its nearest and natural outlet? Is the act to be construed so

as to encourage this practice? And if so, instead of carrying wheat directly across the country from Chicago to New York, why not ship it by the Illinois Central R. R. to New Orleans, thence *via* Mobile and Jacksonville to Charleston, and from Charleston over the Atlantic Coast line to New York?

There must be a limit to this long-line theory, and it seems wise to have some public body organized to fix it. Congress created the commission for this purpose. But, says my friend, they are useless, because they have no power to make the various roads maintain "*reasonably high rates.*"

This is specious. A greater law than Congress can pass, a greater power than the commission has, a greater law than that of competition, will do this. The universal law of self-preservation. The railroads have yet to show any inclination to disobey the dictates of this law, and so far they have never exhibited any inability to take care of themselves.

In the Trans-Missouri case (166 U. S, 330, 331) Mr. Justice Peckham presents this stock argument of the roads with fine irony, in discussing the effect of unrestricted competition. He says the roads urged "that it is too much to ask "of human nature for one company to insist upon charges "sufficiently high to afford a reasonable compensation, and "while doing so to see its patrons leave for rival roads who "are obtaining its business by offering less rates for doing "it than can be afforded and a fair profit obtained there-"from. Sooner than experience ruin from mere inanition, "efforts will be made in the direction of meeting the under-"bidding of its rival until both shall end in ruin. The only "refuge, it is said, from this wretched end lies in the power "of competing roads agreeing among themselves to keep up "prices for transportation to such sums as shall be reason-"able in themselves, so that companies may be allowed to "save themselves from themselves and to agree not to attack "each other, but to keep up reasonable and living rates for "the services performed."

This court appears not to have taken the argument seriously, and at page 338 of the opinion points out that "common interest" and the "exercise of good sense" will produce profitable and reasonable rates.

But all this long-line talk has nothing to do with the case at bar, and is utterly inapplicable. This shipment of Behlmer's was carried over the short line to Charleston. It was not shipped through Nashville, Jackson, Meriden, or Birmingham, but was sent directly from Memphis to Chattanooga, from there to Atlanta, and thence to Augusta, and over the South Carolina road to Summerville. It did not deviate at Augusta and come over the Port Royal and Augusta and the

Charleston and Savannah, thence through Charleston to Summerville. It took the short line; and, according to my friend's own contention, the short line needs no protection; it can take care of itself. There is no possible reason why its intermediate rates should violate the law.

In some cases the long lines may prove sufficient injury to warrant relief in this direction, but the plea is inapplicable to the short line.

THE FINDINGS OF THE CIRCUIT COURT.

In this case the circuit court said: "If the defendants had not consented with each other to lower the rate (from Memphis to Charleston) no hay whatever would come from the hay-producing territory tributary to Memphis, and all the southeast Atlantic States would be compelled to rely on other portions of the West, North or Northeast for hay" (Trans., p. 112).

1. In the court of appeals this was greatly relied on by counsel for the roads as a finding of fact. We suggest, with the greatest respect, that this is not a finding of fact by the circuit court, but a prophecy, pure and simple.

2. This prophecy is completely destroyed as follows:

At page 38, Trans., we find in the answer, section 32: "Respondents aver that *hay is shipped to Charleston, S. C.*, from *Chicago, St. Louis, East St. Louis*, Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, Paducah, Cairo, East Cairo, Belmont, Columbus and Memphis. * * *

"The all-rail rate on class D (Southern Railway and Steamship Association classification) which includes hay, from Chicago to Charleston *via* Ohio River points, is *33 cents per* hundred pounds. The all-rail rate on hay from *St. Louis* and *East St. Louis* to Charleston is *28 cents* per 100 pounds, or 5 cents per hundred pounds less than the all-rail rate from Chicago to Charleston.

"The all-rail rate on hay from Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, Paducah, Cairo, East Cairo, Belmont and Columbus to Charleston is *23 cents* per 100 pounds, or 10 cents less than the all-rail rate from Chicago to Charleston." * * *

SEC. 33. "Active competition has existed for many years between Chicago and the above-named cities on the Mississippi and Ohio rivers; and said cities on the Mississippi and Ohio rivers have been in active competition as between themselves in the sale of hay and other farm products in Charleston and other southeastern cities." * * *

It is needless to observe that if "hay *is* shipped to Charleston, S. C., from Chicago, St. Louis, &c," at 33c., 28c., and 23c.

per 100, the raising of the rate from Memphis above 19c. would not altogether put a stop to shipments from Memphis. The fact that it does come at higher rates from other places in the same vicinity annihilates this theory. Moreover, we suggest, with great respect, that freight rates are not the only things that cause goods to be shipped from various localities. The price of an article may have something to do with this. And as long as Memphis has an advantage in price of from $2 to $5 per ton or an average of $3.50 over New York, hay will come to Charleston even if freight rates should be raised a cent or so.

This idea is prominently brought out by the chairman at pages 77, 78, Trans.:

"Q. The CHAIRMAN: You would go where you found the best market?

"A. Mr. MOLONY: We would try to.

"Q. The CHAIRMAN: And it would depend on the price of hay to begin with—the production as well as the rates?

"A. Mr. MOLONY: Yes, sir.

"Q. The CHAIRMAN: Have you noticed from time to time—I suppose you give sufficient attention to the subject to enable you to answer as to the relative prices of hay between the two markets, Memphis and New York; how do they compare ordinarily?

"A. Mr. MOLONY: Ordinarily the West is cheaper than they are in New York.

"Q. The CHAIRMAN: Take the two points, Memphis and New York.

"A. Mr. MOLONY: It is cheaper in Memphis than in New York.

"Q. The CHAIRMAN: About what is the usual difference?

"A. Mr. MOLONY: It will vary from two to five dollars a ton.

"Q. The CHAIRMAN: An average of about $3.50 per ton?

"A. Yes, sir."

3. Lastly, we call the attention of this court to the fact that we have not sought in our pleadings to have the Charleston rate raised, nor has the commission ordered it. We nowhere ask an increase in Charleston rates or San Francisco rates, or Tokio or St. Petersburg rates. In truth, we have not asked that rates to any point be raised.

At page 133, Trans., the circuit court of appeals says:

"It should be kept in mind that the petitioner does not "ask that the rate from Memphis to Charleston be changed— "that it shall be made less, and consequently unremuner- "ative, or increased, and thereby cause the loss of the "traffic—but only that the rate from Memphis to Sum- "merville shall not be greater than the rate to Charleston."

RECENT CASES ON THE FOURTH SECTION.

We preface the examination of these cases by the remark iterated and reiterated by us throughout the entire progress of this cause in the courts below, namely, that the case at bar must be decided on its own circumstances. This, after all, is the main and chief thing laid down in all the cases—the great, final, impregnable ruling of this court and of the English courts. In the language of Mr. Justice Shiras, in the Alabama Midland case:

"* * * It cannot be doubted, that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case" (*Denaby Main Colliery Company vs. Manchester Railway Co.*, 3 Railway & Canal Traffic Cases, 426; *Phipps vs. London & Northwestern Railway*, 1892, 2 Q. B. D., 229; *Cincinnati, N. O. & Tex. Pac. R. W. vs. Interstate Com. Com.*, 162 U. S., 184, 194; *Texas and Pacific Railway vs. Interstate Com. Com.*, 162 U. S., 197–235). (Trans., 149; 168 U. S., 170.)

The case at bar, then, is not the "Import Rate case" nor the "Party Rate case" nor the "Troy case" nor the "Cincinnati Freight Bureau case," nor the "Chattanooga case" decided by Judge Severns, but it is the Behlmer case or the "Summerville Hay case," and is nearly the "Social Circle case" over again.

At page 65, Trans., we find:

"Q. By the CHAIRMAN: Mr. Baxter, this is nearly the Social Circle case over again?

"A. Mr. BAXTER: Yes, sir."

With these preliminary statements we will examine briefly three cases which have been decided in the circuit courts since this court delivered its opinion in the Alabama Midland or "Troy case."

It seems that not being satisfied with the difficulties he has engendered in regard to the true construction of the statute itself, the ingenious counsel for the roads has progressed one step farther and has now involved the lower courts in a controversy as to the true construction of the decision of this court in the Alabama Midland or "Troy case."

It is not improbable that the next question raised will be the true construction of the construction placed by the lower courts on the true construction of the statute by this court, thus opening up an engaging vista, from the railroad

view, of endless doubt and difficulty. We mention this merely to illustrate the methods used in the set purpose of the roads to cast the enforcement of the law into hopeless confusion.

At any rate, it seems that Judge Speer and Judge Newman and Judge Severens are not at one in their understanding of this court's opinion.

In Brewer *vs.* Central of Georgia R'y Co., 84 F. R., 258, Judge Speer refuses an application for a preliminary injunction asked for on the bill and answer, and without any evidence at all before him, no testimony having been taken, proceeds to discuss "substantially similar circumstances" at great length, and, curiously enough, does this in the face of copious quotations from the opinion of this court in the Troy case, holding that these "are questions of fact *depend-* "*ing on the matters proved in each case*," and that the courts must give effect "to the findings of fact in the report of the "commission as *prima facie* evidence" (168 U. S., 170–175).

It goes without saying that we mean no disrespect by characterizing this action of the learned judge as curious, but it is hard to account for it on any other theory than that he misinterprets the decision of this court.

Another singular feature of this opinion is the argument in a circle by which he shows that low rates would not benefit an intermediate point like Griffin, because, while "Brunswick has the same rates as Savannah, its harbor is "as fine as that of Savannah, and yet, not possessing the "abounding capital of Savannah, no one can pretend it has "been its successful competitor."

Therefore Griffin must not have low rates like Macon because Macon's superior capital would nullify any benefit to Griffin in spite of possessing the same rates. He then proceeds to show that, on the other hand, Griffin should not have the same rates as Macon, because "it would in all "likelihood so seriously cripple the business of Macon as to "be injurious beyond measure."

Thus, the intermediate locality is not to have low rates because the superior advantages of the larger place could not be affected, and the intermediate locality is not to have low rates because the larger place would be disastrously affected.

The learned judge considered it entirely unworthy of notice that Macon rates need not be raised at all, but that the commission's order could be fully complied with by lowering the rates at the intermediate point, Griffin. The commission in its twelfth annual report calls attention to this; and it is just as well to say now that this is quite a favorite oversight of the roads, and many of the courts have

been misled by the prominence given to the idea in the arguments put forward that rates must be raised at one point while suppressing the fact that they can be lowered at the other.

Having proved by the instance of Savannah and Brunswick that enjoying the same rates does not make two places even commercial rivals, much less commercial peers, the learned judge winds up by asking:

"Shall Government undertake the impossible, but injuri-
"ous, task of making the commercial advantages of one place
"equal to those of another. It might as well attempt to
"equalize the intellectual powers of the people. There
"should be no attempt to deprive a community of its natural
"advantages, or those legitimate rewards which flow from
"large investments, business industries, and competing
"systems of transportation to facilitate and increase com-
"merce. The act to regulate interstate commerce has no
"such purpose, and yet this appears to be the inevitable re-
"sult of the relief the complainants seek in this case, with-
"out any adequate corresponding advantage either to them-
"selves or to the community in which they live."

All these calamities, even to the prostitution of the powers of government in this great Republic, are "inevitable," if Griffin gets the same rates as Macon, while at the very same time having identical rates does not equalize Savannah and Brunswick. Perhaps the climate on the coast prevents this.

The next case is the one commonly known as "the Chattanooga case," reported as I. C. C. *vs.* E. T., V. & G. R'y Co., 85 F. R., 107.

At page 114 Judge Severens says:

"As the circumstances vary infinitely and constantly in
"the course of such business, it would seem that Congress
"must have intended something unusual and peculiar out
"of the ordinary course, not ordinarily incident to the busi-
"ness, as that which would create a substantial dissimilarity
"for otherwise the vast bulk of transportation would not be
"subject to the rule at all. The case of Interstate Commerce
"Commission *vs.* Alabama Midland R'y Co. above cited, is
"much relied upon by counsel for the railroad companies as
"giving warrant for the discrimination made in the present
"case, but the Supreme Court in that case, while reaffirming
"the doctrine that competition between railway carriers
"might, and frequently ought to, be considered in adjusting
"rates under the long and short haul clause, yet took pains
"to prevent the inference from its opinion that it should be
"regarded as a controlling consideration."

At page 115 he says:

"If railway carriers engage in a competitive struggle for

"business at a place where they meet and underbid each "other or other carriers to a point which is not in itself re- "munerative can they turn back on the line and, taking "advantage of the conditions existing at other localities "arising either from the fact that there is no opportunity for "competition or from the fact that by concert of the carriers "there is none, charge such rates for the shorter haul as "shall make good their lack of profits in competitive busi- "ness and even up the profits on their whole business to the "point they set before themselves as reasonable?"

At pages 117 and 118 he says:

"I am aware that the commission in December last, in "announcing its opinion in the case of Savannah Bureau of "Freight and Transportation *vs.* Charleston and S. R'y Co., "evidently disheartened by the adverse rulings of the Supreme "Court in recent cases, more especially those of Interstate "Commerce Commission *vs.* Cincinnati, N. O. and T. P. R'y "Co., 167 U. S., 479, and Interstate Commerce Commission "*vs.* Alabama Midland R'y Co., 168 U. S., 144, seems to "give up section 4 as of no force or effect in any case where "the conditions are not 'substantially similar.' After refer- "ring to its former holding that competition between car- "riers subject to the statute did not create such dissimi- "larity of conditions as would justify discrimination the "commission goes on to say: 'Since then, however, the "'Supreme Court of the United States, by its decision in the "'case of Interstate Commerce Commission *vs.* Alabama "'Midland R'y Co. (decided November 8, 1897), 168 U. S., "'144, has determined that this view of the law is erroneous "'and that railway competition may create such dissimilar "'circumstances and conditions as exempt the carrier from "'an observance of the long and short haul provision. "'Under this interpretation of the law, as applied to the "'facts found in this case, we are of the opinion that the "'charging of the higher rate to the intermediate points, as "'set forth, is not obnoxious to the fourth section. The sec- "'tion declares that the carrier shall not make the higher "'charge to the nearer point under substantially similar "'circumstances and conditions.' If the conditions and "circumstances are not substantially similar then the sec- "tion does not apply and the carrier is not bound to regard "it in the making of its tariffs.'"

"Now, I do not understand that such a conclusion follows "from that decision. On the contrary, I suppose that when "a violation of the long and short haul provision is charged, "competition is one of the elements which enter into the "determination whether the conditions are similar, and, if "dissimilarity is found, then the further question arises

"whether the dissimilarity is so great as to justify the dis-
"crimination which is complained of. The language of the
"act ought not to be tied up by such literal construction.
"If it were, then if it should be found that the dissimilarity
"of conditions is really in favor of the locality discriminated
"against, the provision would not apply—a result contrary
"to the manifest intent. In other words my opinion is that
"the restraint of section 4 is to be applied upon the scale of
"comparison between the dissimilarity of conditions and
"the disparity of rates, and that it is competent under that
"section to restrain the exaction of the greater charge for
"the shorter haul, although there may be substantially dis-
"similarity of conditions, provided the dissimilarity is not
"so great as to justify the discrimination made. But the
"long and short haul clause is only one of the specific pro-
"visions employed for the general purpose of the act. The
"third section underlies the fourth, and supplies the prin-
"ciple on which it rests; so that, if the literal construction
"referred to be put upon the fourth section, the case would
"still be exposed to the third section; which forbids undue
"preference to one locality or the subjection of another to
"any undue disadvantage."

In this case Judge Severens reviews and considers "the whole body of the evidence" as he says, quoting the Supreme Court, and concludes that the haul complained of was under "substantially similar circumstances and conditions."

Amongst other things he alludes to the remarkable fact that while Nashville has but one railroad and Chattanooga has "many more railroads," yet the roads do not choose to compete at Chattanooga (85 F. R., p. 116), and Nashville, the longer-distance point, receives a lower rate. Thus while the conditions are substantially dissimilar at Chattanooga, and the dissimilarity is strongly and substantially in favor of that place because of numerous railroads centering there and for other reasons pointed out by the court, nevertheless Nashville is given a far lower rate.

This extraordinary fact undoubtedly prompted Judge Severens to hold that the Supreme Court could not have meant in the Alabama Midland decision that in all cases where there is a substantial dissimilarity the act is abrogated. It could not have meant that where the substantial dissimilarity existed in favor of the locality discriminated against the provision would not apply. This would be contrary to the manifest intent (85 F. R., 118).

In discussing this opinion of Judge Severens counsel for the roads contended before Judge Newman that it necessitated reading a judicial amendment into the fourth section of the act.

This is by no means true, and this court has laid it down in numerous cases that—

"General terms should be so interpreted in their applica-
"tion as not to lead to injustice, oppression, or an absurd
"consequence. It will always, therefore, be presumed that
"the legislature intended exceptions to its language which
"would avoid results of this character. The reason of the
"law in such cases should prevail over its letter. The
"common sense of man approves the judgment mentioned
"by Puffendorf, that the Bolognian law which enacted
"'that whoever drew blood in the streets should be pun-
"'ished with the utmost severity,' did not extend to the
"surgeon who opened the vein of a person that fell down
"in the street in a fit. The same common sense accepts the
"ruling cited by Plowden, that the statute of first Edward
"II, which enacts that a prisoner who breaks prison shall
"be guilty of a felony, does not extend to a prisoner who
"breaks out when the prison is on fire, 'for he is not to be
"'hanged because he would not stay to be burnt.'"

U. S. *vs.* Kirby, 7 Wall., 482.
Holy Trinity Church *vs.* U. S., 143 U. S., 461.

The Chattanooga case was appealed by the roads, and has been argued and submitted to the circuit court of appeals for the sixth circuit. No decision has yet been rendered by that court.

The next case is that of The Interstate Com. Com. *vs.* Western & A. R. Co., 88 F. R., 186.

On a review of the evidence Judge Newman decided that the circumstances and conditions were substantially dissimilar and he decided in favor of the roads.

At page 195, 88 F. R., Judge Newman quotes the language of Judge Severens, hereinbefore set out, and says:

"This view of the law suggested by Judge Severens, it is
"submitted, with the utmost deference, is not the view
"adopted by the court, or, indeed, by the Interstate Com-
"merce Commission itself. The view generally entertained
"is that, if the circumstances and conditions at the longer-
"distance point are substantially dissimilar from those at
"the shorter-distance point, the fourth section of the act is
"inapplicable."

This case has also been appealed, but no decision has yet been rendered by the circuit court of appeals.

This concludes an examination of all the cases decided since the Alabama Midland decision.

Now, whether or not this court shall ultimately hold that the fourth section, although it is remedial, shall be strictly construed and literally interpreted, as counsel for the roads

contends, and as he has induced Judge Newman to hold, or whether the construction of the act by Judge Severens in the light of the Alabama Midland decision, as he reads it, shall prevail, it cannot affect the case at bar in either event.

For it has been decided as a matter of fact from the "entire body of the evidence" that the circumstances and conditions in this case are substantially similar. This finding of fact by the circuit court of appeals, concurring with the commission, is sustained by the testimony and is unassailable.

So all the requirements, either under a literal or a liberal construction of the fourth section, are fulfilled, and this case comes clearly within the ambit of the act. Every case must turn on its own facts, and this case must be determined without regard to the circumstances and conditions in any other case.

Furthermore, it must be decided upon the record "in the "light of all the facts duly alleged and supported by com-"petent evidence" (162 U. S., 197). Nothing outside of the record can be considered.

COMPETITION BY RIVAL LINES NOT CONTROLLING ONLY ONE OF MANY ELEMENTS.

In passing, it may be well to say, however, that outside of the fact that a remedial statute is to be liberally construed, Judge Severens finds strong, if not conclusive, confirmation of his views in the following cases: In *Detroit, Grand Haven & Milwaukee R. R. vs. Interstate Commerce Commission*, 43 U. S. App., 308, The Circuit Court of Appeals, 6th circuit, says:

"And there is not any doubt that whatever may have "been thought heretofore on the point in England, now "competition of rival lines is *one* of the circumstances that "must be considered, *not as controlling, but as an element* "*along with others* to justify the discrimination of which "complaint is made." (Italics mine.)

This decision was affirmed by the Supreme Court in Int. Comm. Com. *vs.* D., G. H. & M. R. R., 167 U. S., 638. *In Phipps vs. London & Northwestern Railway*, 1892, 2 Q. B. D., 229, Wills, J., says:

"Although *effective competition with another railway or canal* "*company will not of itself justify a preference, which is other-*"*wise quite beyond the mark*, yet, still it is not a circumstance "that can be thrown out of the question, and I think there "is abundance of authority for that."

This language was quoted with approval by this court in the Import Rate case, 162 U. S., 197.

SUMMERVILLE IS NOT A COMPETITIVE POINT.

My friend uses the argument that Summerville is not a competitive point.

This is our very grievance. We complain on the ground that we are not allowed to compete. It surely is not the fault of Summerville. The roads, having tied her hand and foot, now accuse her and blame her because she can't run. This is adding insult to injury with a vengeance.

The sixth circuit court of appeals says:

"It does not, then, become a matter of competition and business rivalry, but substantially of the annihilation of the business of this company at that point, or, more intolerably, a denial to this company of the right to compete with its rivals as it now may" (*D. G. H. M. R. R. v. I. C. C.*, 43 U. S. App., 308; affirmed, 167 U. S., 633).

If this be true as to railroads, is it not equally true and intolerable as to towns?

Again, speaking of competition, Judge Hammond says, in the same case:

"The statute cannot be violated merely to get traffic from a rival by giving lesser rates than to people more favorably situated; cannot bleed Ionia to make up for the misfortunes of competition at Grand Rapids, for Congress has prohibited such a practice, but it has not prohibited the carrier from resorting to a cheaper method of securing access at Grand Rapids than one more costly."

Under this decision the roads cannot bleed Summerville to make up for the misfortunes of competition at Charleston. And, as we have shown in the case at bar, we have chimerical competition, not real and actual.

And Judge Severens says: "If railway carriers engage in "a competitive struggle for business at a place where they "meet, and underbid each other or other carriers to a point "which is not in itself remunerative, can they turn back on "the line, and, taking advantage of the conditions existing "at other localities, arising either from the fact that there is "no opportunity for competition, or from the fact that by "concert of carriers there is none, charge such rates for the "shorter haul as shall make good their lack of profits in "competitive business, and even up the profits on their "whole business to the point they set before themselves as "reasonable?" (I. C. C. *v.* E. T., V. & G. R'y Co., 85 F. R., 115).

And this court says:

"That, in passing upon questions arising under the act, "the tribunal appointed to enforce its provisions, whether

" the commission or the courts, is empowered to fully con-
" sider all the circumstances and conditions that reasonably
" apply to the situation, and that, in the exercise of its juris-
" diction, the tribunal may and should consider the legiti-
" mate interests as well of the carrying companies as of the
" traders and shippers, and in considering whether any par-
" ticular locality is subjected to an undue preference or disad-
" vantage *the welfare of the communities occupying the localities*
" *where the goods are delivered* is to be considered as well as
" that of the communities which are in the locality of the
" place of shipment" (162 U. S., 233. Italics mine).

In the case at bar Summerville is the place where the goods are to be delivered, and her interests are to be considered, and her commerce is not to be hampered or destroyed. It will be recalled by this court that in the Social Circle case it was claimed that the all-rail rates from Cincinnati to Augusta had to be reduced to meet the rail and ocean rate from Baltimore via Charleston to Augusta, and that the influence of the ocean extended as far as Augusta.

It is extraordinary, then, that in the case at bar the influence of the ocean stops at Charleston and does not extend to Summerville, which is within sound of the surf.

HOW RAIL AND WATER COMPETITION CAUSED RATES TO BE REDUCED.

In the court below counsel for the roads said in his brief:

"The rate from Memphis to Charleston was reduced from 23 cents to 19 cents in 1891 on account of the movement by rail and water lines; and, if this rate were restored to 23 cents, the traffic would go back to the water lines" (Trans., pp. 77, 71; *78, 72 here.*)

At page 78, Trans., we find:

"Q. Mr. BAXTER: Mr. Jackson, I wish you would explain to the commission when this rate was made 19 cents, and whether it was higher or lower before.

"A. Mr. JACKSON: The rate of 19 cents from Memphis to Charleston was reduced from 23 cents to 19 cents in August, 1891. *That is my recollection.* That reduction was made necessary on account of the movement by the rail and water lines. We were carrying a 4-cent higher rate from Memphis and Ohio and Mississippi River points than we are now carrying. It was necessary to reduce them to meet this water and rail competition."

It will be observed that Mr. Jackson does not speak positively, but contents himself with saying, "That is my recollection."

Mr. Jackson says the rates were reduced in 1891 from

Ohio and Mississippi River points, according to his "recollection." Let us take the two points of St. Louis, on the Mississippi, and Louisville, on the Ohio.

The present (1893, date of testimony) *reduced?* rates are (Trans., p. 59):

Reduced? rate,	1893, St. Louis	to Charleston	.....	28c.	per 100 lbs.
Before reduction,	1888, "	" "	.....	25c.	" " "
Reduced? rate,	1893, Louisville	" "	.....	23c.	" " "
Before reduction,	1888, "	" "	.....	20c.	" " "

Mr. Jackson's "recollection" seems again at fault. The information as to the rates of 1888 is to be found as follows:

In the case of Tariffs and Classifications, Atlanta & West Point R. R., 3 I. C. Com. Rep., p. 45, the commission says:

"There is, for example, proof of the existence of considerable freight traffic from Chicago, *St. Louis* and other points in the Western States to *Charleston*, Savannah, Brunswick and other points on and near the Atlantic seaboard, consisting of packing-house products, flour, grain, etc. Taking as an illustration class D (grain), the rate, as established Sept. 30, 1888, by the Southern Railway and Steamship Association, over these and other lines from *St. Louis* to the Atlantic Coast points referred to, was 25 *cents.*" * * *

At page 32 of this case, 3 I. C. Com. Rep., we find:

"Taking *Louisville* as a sample of the Ohio River and western points, the Southern Railway and Steamship Association phamphlet gives lower rates to southeastern coast points than to any, even the competitive interior points. The first-class rate to Savannah, Port Royal, *Charleston* and Brunswick, is 95 cents. The rate on class D (corn, etc.) to the same points, in December, 1888, was 20 *cents.*"

A RATIONAL SYSTEM BY WHICH THE FOURTH SECTION IS COMPLIED WITH IN OTHER PARTS OF THE COUNTRY.

At page 54, *In re* L. & N. R. Co., 1 I. C. C. R., Judge Cooley says:

"The commission is informed that the interstate roads "north of the Potomac and the Ohio, and east of the Mis-"souri with substantial unanimity, have conformed to the "requirements of the fourth section by putting in force "tariffs rearranged accordingly. Some friction was mani-"fested for a time, arising largely from the discontinuance "of special rates, favors, and privileges, and from the adop-"tion of new classifications; but where the fourth section "has thus been made operative very few instances have "come to our attention of injury thereby occasioned."

It can hardly be that railroad men in the territory north of the Ohio are less intelligent than those in the South, and less capable of understanding their true interests, and that by adopting this system they have sacrified their property. If they could find a method of complying with the law, it seems that the roads in this region could do likewise.

The system adopted in the trunk line and central traffic territory and the New England States—that is, the territory north of the Ohio and Potomac—is that of percentages, and is a perfectly fair, safe, wise, and satisfactory system, and under it the fourth section is fully observed.

It is thus described at page 88, Trans.:

"Answer. The rates from the Central Traffic Association territory to the trunk line and New England territory are made as follows:

"The rates from Chicago to New York are fixed by what is known as the joint committee, which is a committee representing the Trunk Line and Central Traffic Associations, and also includes certain New England roads, and others which are not members of either of the above-mentioned associations. These rates between Chicago and New York city are the basis of all other rates from points in this central traffic territory to eastern points. Boston being made certain differentials higher than New York city, and Baltimore, Philadelphia, and other principal points certain differentials lower. Rates to local points in these territories are made either the same as the above-mentioned points, or certain differentials higher or lower. Intermediate points on the direct line are usually made the same as the terminal points, or lower. For instance, points in the vicinity of New York, Philadelphia, Boston and Baltimore, usually take the same rates as these cities, or a lesser rate, the farther west they happen to be situated, until the western boundary of the trunk line territory is reached. From all other points in the Central Traffic Association territory than Chicago, the rates to the trunk line, New England territory, are made a percentage of the Chicago and New York rate. For instance, Peoria, Ill., which is west of Chicago, is a 110 per cent. of this rate, or 10 per cent. higher than Chicago. Terre Haute, Ind., takes a hundred per cent. of the Chicago rate, or the same as Chicago; Columbus, O., takes 77 per cent. of the Chicago rate, being farther east.

"Question 7. How does this system affect long and short hauls?

"Answer. Under this system throughout the territory mentioned the rates for shorter distances are generally not higher than for the longer distances; the intermediate points

usually taking the same or lower rate than the principal terminal point.

"Question 8. Give some instances of intermediate points taking the same rate as the terminal.

"Answer. Exhibit B shows certain intermediate points taking the same rates as New York, Philadelphia, Baltimore and Boston, also the distances from those points and the roads on which said points are situated."

Exhibit B, page 89, Trans., shows:

"Points on the Pennsylvania railroad taking New York rates on shipments of freight from Central Traffic Association territory:

"Elizabeth, N. J., 14 miles west of New York.

"Menlo Park, N. J., 24 miles west of New York.

"Trenton, N. J., 56 miles west of New York.

"Points on the Pennsylvania railroad, taking Philadelphia rates:

"Frazer, Pa., 24 miles west of Philadelphia.

"Columbia, Pa., 80 miles west of Philadelphia.

"Points on the Baltimore and Ohio railroad taking Baltimore rates:

"Annapolis Junction, Md., 17 miles west of Baltimore.

"Washington, D. C., 40 miles west of Baltimore.

"Rockville, Md., 56 miles west of Baltimore.

"Harper's Ferry, W. Va., 95 miles west of Baltimore.

"Cumberland, Md., 192 miles west of Baltimore.

"Points on the Boston and Albany railroad, taking Boston rates:

"Worcester, Mass., 44 miles west of Boston.

"Brookfield, Mass., 67 miles west of Boston.

"Springfield, Mass., 99 miles west of Boston.

"Westfield, Mass., 108 miles west of Boston.

"Dalton, Mass., 145 miles west of Boston.

"Chatham, N. Y., 177 miles west of Boston."

It is hard to see, if such a system prevails elsewhere, why it should not be put in operation south of the Ohio and Potomac rivers. It complies with the law, works beneficially for the roads, and is fair to the public.

Counsel for the roads usually relies on these two reasons for not adopting it in the South:

1. That the Pennsylvania road put this system in operation prior to the passage of the interstate commerce law because its business had developed in volume and extent, especially its local business, to such a point that it could do so with profit and advantage. In fact, it was the best policy under such conditions, as it would be for any road running through a densely populated district.

2. That, owing to the prevalence of rivers and waterways

in the South, the competition is too great to allow the putting in force of such a system (Mr. Baxter's Brief, 134).

Reason No. 2 hardly deserves notice, for it is a matter of public knowledge, and a fact of which this court will take judicial notice, that the territory north of the Ohio is penetrated in every direction by navigable rivers—the Delaware, the Hudson, the Susquehanna, Alleghany, Monongahela, the Connecticut, Penobscot, and other great streams; that it is surrounded by the Great Lakes, the finest inland waterway in the world, the St. Lawrence, the Mississippi, and the Ohio and Potomac rivers and the ocean, and that great bays, such as the Chesapeake and Delaware, and great sounds, like Long Island sound, enter into it; that it has canals like the Erie canal and lakes like Lake Champlain; and, in fact, its waterways are larger, finer, and more highly improved than those in the South; that New York State, the heart of this territory, has for two-thirds of its boundaries navigable rivers and a total water frontage of 880 miles.

It is idle, therefore, to assert that the roads in the South meet with more water competition than the roads in the North. The reverse is true.

As to reason No. 1, about the Pennsylvania road, it seems, according to Judge Cooley, that all the roads north of the Ohio conformed to the fourth section after the passage of the act to regulate commerce and not before. However, there are many other roads in this territory besides the Pennsylvania, and they made the change after the law was passed and in obedience to its mandate.

As to the density of population in the North my friend is mistaken. That is, in proportion to the mileage, a most important particular.

Strange as it may seem, there are more people in proportion to the mileage in groups IV and V, comprising the States south of the Ohio and east of the Mississippi, excluding the State of Florida, than in groups II and III, comprising the States north of the Ohio and east of the Mississippi and excluding the New England States.

That is, the statistics show that in groups IV and V, excluding Florida, there are 10,000 people to every 20.21 miles of road, while in groups II and III there are 10,000 people to every 20.88 miles of road.

In other words, in the Southern States there are more people to support the roads than in the North, proportionately.

That population is an important factor to be considered has been decided in the Reagan case, 154 U. S., 408, where the court says:

"May not the building of those other roads have increased

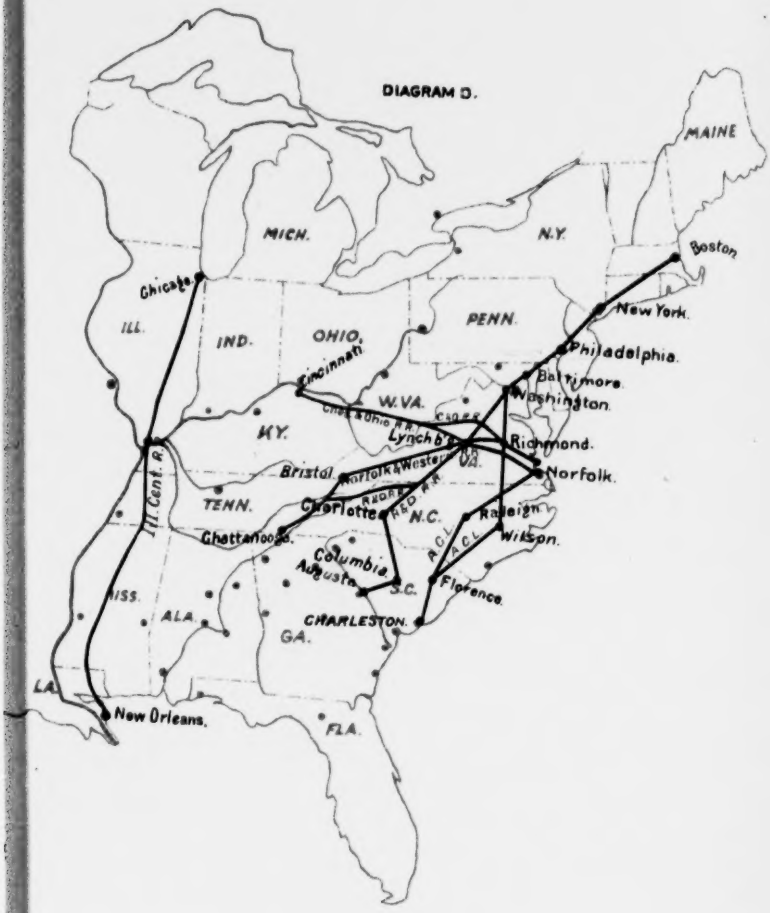


DIAGRAM D.
MAINE
MICH.
N.Y.
Boston
Chicago
ILL.
IND.
OHIO.
Cincinnati
PENN.
New York.
Philadelphia.
Baltimore.
Washington.
W.VA.
Chesa & Ohio R.R.
Lynchburg
Richmond.
KY.
Bristol
Norfolk & Western R.R.
VA.
Norfolk.
Ill. Cent. R.
TENN.
Charlotte
Atlantic Coast Line R.R.
N.C.
Raleigh
Wilson.
Chattanooga.
Columbia
Augusta
S.C.
A.C.L.
Florence
MISS.
ALA.
CHARLESTON.
GA.
LA.
New Orleans.
FLA.

the population and business to such an extent, that the overflow has, so far from diminishing, really resulted in an increase of the business of the International and Great Northern. (Italics mine.) (See also Smythe *vs.* Ames, 169 U. S., 540.)

We get our data for this statement about mileage and proportionate population from Statistics of Railways, p. 11, published by I. C. C., 1894.

As to the great local traffic of the Pennsylvania road, of which there is no evidence in this case, we say the statistics do not indicate such a great difference between the groups, and that the average haul of one ton is not much longer in groups IV and V than in groups II and III. At page 54, Statistics of Railways, we find average haul per ton:

Group II, 109.66 miles.
Group III, 117.07 miles.
Group V, 113.18 miles.
Group IV, 174.01 miles.

These statistics indicate that in group X (California, &c.) there is a great deal of long-distance traffic, the average haul there being 213.88 miles.

ROADS IN THE SOUTH THAT CONFORM TO FOURTH SECTION.

Recognizing the truth that comparison with roads not in the same territory is of little value, as the commission and the courts have held, we show in Diagram D some roads in the South that have conformed to the fourth section with good results to themselves.

Judge Cooley, speaking of the Richmond and Danville, says:

"After the orders which were made for relief under the fourth section of the act had expired *the defendant entered upon an extensive revision of its tariff sheets* in the direction of bringing them more nearly into conformity with the general rule prescribed by that section and *with the result that there is not now any point on the line of defendant's roads north of Columbia, S. C.*, to which a consignment at the established rates would *result in a greater charge* being made *for the shorter haul of the like kinds of property on the same line and in the same direction.* This result has been brought about principally by a gradual reduction of the rates at non competitive points, and, though some increase in rates has been made at some of the competitive points, the increase has not been general, nor in any case which has been brought to our attention has it been very great. The charges, however, being in the direction of equalizing railroad advantages as

between competitive and non-competitive points must necessarily to some extent prejudice the jobbing interests of towns situated as Danville has been, not only because they render it possible for rival establishments to spring up and maintain themselves in the smaller towns, but because the retailers in the smaller towns under the favorable rates which are now given them are enabled to deal directly in larger and more distant markets. Nobody can justly complain of a railroad company for so equalizing its rates as to render this possible, for the law had such an equalization of rates as one of its leading purposes and provided for it because justice as between the competitive and non-competitive points seemed in the opinion of the legislature to require it."

Crews vs. R. & D. R. R., 1 I. C. C., 409.

The commission *in re* tariffs and classifications Atlanta and West Point R. R. Co., 3 I. C. Com'r Rep., p. 19, says:

"In all this business between the Atlantic seaboard and the Western and Southwestern States handled in competition with the trunk lines (of which, in fact, the Chesapeake and Ohio may be called one) the principle of obedience to the requirements of the fourth section of the act to regulate commerce is preserved; in other words, in making rates over this line between the Western and Southwestern States and local points in Virginia situated upon the Chesapeake and Ohio and Richmond and Alleghany roads the tariffs do not show that rates are higher to intermediate points than to more distant points over the same line" (3 I. C. C., 34).

"The interstate traffic of the Norfolk and Western is considerable in both directions. In many respects, it is conducted in conformity with the principle of the short-haul clause of the act.

"Rates to and from points east of Petersburg are no higher than to and from Petersburg; to and from points east of Lynchburg, are no higher than to Lynchburg; and the same is true of intermediate points east of Roanoke and of Bristol, respectively" (3 I. C. C., 35).

"Rates in the reverse direction to distant western and southwestern points are generally made, observing the short-haul principle of the law, so far as the point of shipment is concerned; that is, no more is charged from intermediate points upon the Norfolk and Western road than from other points more distant over the same line" (3 I. C. C., 39).

"The earnings of this road, both gross and net, have been very considerably increased during the period since the act to regulate commerce took effect" (3 I. C. C. R., 39).

Atlantic Coast Line and Seaboard air line (3 I. C. C. R., 44):

"The situation of these lines is quite peculiar, as rates to and from the eastern cities are largely available at coast points." * * *

"The violations of the fourth section are not many. Nor does the disparity between the points affected by ocean rates and interior points appear to be extreme, so far as the rates have been examined by the commission."

"* * * the Queen and Crescent, local rates have been established, which are progressive in their form, and not violating the general rule of the fourth section of the act except at river points.

"Its officers are quite ready to say that the changes which it has made in the direction of conformity to the law have not been detrimental to its revenue, but, on the contrary, have benefited the carrier, and have produced a feeling of satisfaction along its line, which is of material assistance to the prosperity of the road" (3 I. C. C. R., 85).

"Similar results have been experienced by the Illinois Central and other southern roads, which have entered upon the same policy.

"So far, therefore, as the experience of carriers during the time since the passage of the act has developed results consequent upon the actual introduction and application of the short-haul rule, it is clear that the evils anticipated were, to a large extent, non-existent, and that the relations between the carriers and their patrons have been quite materially improved" (3 I. C. C. Rep., 85).

Now, my friend, in his very able brief, has said the commission orders a ruinous reduction without suggesting a remedy. He is quite in error in this, for at pages 48 and 49 of the Atlanta and West Point case the commission say:

"Moreover, the adjustment required does not necessarily involve an immediate loss of revenue. An advance of a single cent, for example, on the various classes and specials composing the large interstate traffic to and from Atlanta would compensate the carriers for very considerable reductions on the comparatively light interstate traffic which is now carried to local points on the Atlanta combination.

"The operation of this system in the Eastern and Western States, by way of developing local communities, has wrought benefits to the country at large, which are obvious to the most superficial observer."

If, as General Manager Ward says, this grain and hay traffic constitutes three-fourths of the business of the road, and the amount taken to Charleston exceeds all of the busi-

ness at local stations (Trans., pp. 74 and 75) by increasing the rate to Charleston by one cent, as the commission suggests, it would be the means of obviating an immediate loss of revenue.

At any rate, we confess our inability to see why these roads cannot do as the Richmond and Danville and the Atlantic Coast line have done in this territory.

UNREASONABLENESS AND UNLAWFULNESS OF ADDED LOCAL OR SOUTHERN SYSTEM OF RATE-MAKING.

The first proposition on this branch of the controversy is that the rates in this case are wrong in principle, and that necessarily the operation of a false principle or system produces unreasonable results, namely, the rates in this case. This is an important matter, because it involves the legality of the Southern system of rate-making.

The case at bar is a very clear illustration of the subject in all its phases, and we are fortunate in having the facts indisputably established. The rates in this case and throughout the South are made in the following way:

In his petition before the commission Behlmer, after stating in paragraphs 6 and 7 that he was forced to pay 28 cents per hundred, or $56 per car-load, on hay and grain to Summerville, the shorter distance, whereas it was hauled to Charleston, the longer distance, for 19 cents a hundred, or $38 per car-load, alleges:

"9. For a further complaint your petitioner alleges that "he is informed and believes that the additional 9 cents per "hundred which he is forced to pay is a so-called local rate "from Charleston to Summerville, a distance of 22 miles, "whereas the through rate from Memphis to Charleston is "19 cents per hundred, the distance being 771 miles; that "said local rate is imposed by the South Carolina Railway "Company or its receiver, who now operates the road, or by "the Southern Railway and Steamship Association.

"10. Your petitioner alleges that on its face this so-called "local rate of 9 cents per hundred for 22 miles is excessive "and unreasonable, and the aggregate charge of 28 cents per "hundred from Memphis to Summerville is excessive and "unreasonable and in violation of section 1 of the act of "Congress of February 4th, 1887, entitled An act to regu-"late commerce, which provides, &c." (Trans., p. 8):

This charge is reiterated in section 10 of his bill of complaint filed in the Circuit Court (Trans., p. 5). This is admitted in the joint and several answer in section—

"25. Respondents aver that the rate of 28 cents per 100 "pounds on hay from Memphis to Summerville is, as stated "above, a combination rate; that it is arrived at by taking "the joint through rate of 19 cents per 100 pounds from "Memphis to Charleston and adding thereto the local rate "of the South Carolina railroad of 9 cents per 100 pounds "from Charleston to Summerville, thus making a total com- "bination rate of 28 cents per 100 pounds from Memphis via "Charleston to Summerville (Trans., p. 36).

"24. Respondents aver that it is 21 miles from Charleston "to Summerville. The local rate charged by the South "Carolina railway on hay from Charleston to Summerville "is 9 cents per 100 pounds. The standard tariff of the South "Carolina railroad commission, referred to above, allows "the railroads of that State to charge on hay a rate of 9 "cents per hundred pounds, for a distance of 21 miles, and "said tariff was adopted, as stated above, under a law of that "State which authorized and required said commission to "make just and reasonable rates" (Trans., p. 36).

These allegations and admissions are fully sustained by the evidence (Trans., pp. 50, 51, 53, 61, 65, 66, 67).

On the testimony the commission found this as a fact (Trans., pp. 20, 21).

The evidence shows that the freight is not transported to Charleston and back again to Summerville, but that the cars are switched off at Summerville in accordance with the usual practice at all intermediate stations—that is, $18 per car-load is charged and collected for a purely constructive or imaginary haul (Trans., pp. 51, 75).

Such are the facts showing the method or system of rate-making in this case and in this section, and it would be unnecessary to add anything further to the statement, were it not for something that occurred in the Circuit Court of Appeals.

We there urged that the transportation from Memphis to Summerville, through the States of Tennessee, Mississippi, Alabama, Georgia, and South Carolina, a journey from the Mississippi river to a point within sound of the surf of the Atlantic ocean, could not be regarded or treated as local in any respect. We pointed out that—

In the Social Circle case, p. 398, I. C. R., & 162 U. S., p. 191, Mr. Justice Shiras said: "Upon this part of the case "the conclusion of the Circuit Court was that the traffic "from Cincinnati to Social Circle, in issue as to the Georgia "Railroad Company was *local*, and that that company was "not, on the facts presented, made a party to a joint or com- "mon arrangement such as make the traffic to Social Circle "subject to the control of the Interstate Commerce Com-

"mission. We are unable to accept this conclusion." (Italics mine.)

That Mr. Chief Justice Fuller in Leisy *vs.* Hardin, 135 U. S., 109, after reviewing all the cases, had said: "But "the transportation of passengers or of merchandise from "one State to another is in its nature national." * * *

That in Gloucester Ferry Co. *vs.* Penn., 114 U. S., 196, this court said: "And it needs no argument to show that the "commerce with foreign nations and between the States, "which consists in the transportation of persons and prop- "erty between them, is a subject of national character, and "requires uniformity of regulation."

That in Phila. Steamship Co. *vs.* Penn., 122 U. S., 336, this court said: "To apply the language of Chief Justice Mar- "shall, *fares and freights for transportation in carrying on in- "terstate or foreign commerce* are as much essential ingredients "of that commerce as transportation itself." (Italics mine.)

That in the Wabash case, 118 U. S., 571, the Supreme Court, speaking "of a continuous transportation of goods "from New York to central Illinois, or from the latter to "New York," says: "Whatever may be the instrumentali- "ties by which this transportation from one point to the "other is effected, it is but one voyage, as much so as that "of the steamboat on the Mississippi river." It is therefore free from "*local rules and local regulations*," "concerning the "*price, compensation* or taxation, or any other restrictive "regulation" * * * as to "*fares and charges*" and "*rates of transportation*" (118 U. S., 572–577). (Italics mine.)

We showed that this Wabash case had been cited and approved by the Supreme Court in twelve subsequent cases, and we elaborately reviewed all the cases on the point from Gibbons *vs.* Ogden, 9 Wheaton, 195, down, and established that the irresistible deduction was that there must be interstate rates for interstate commerce, and that a through interstate rate is a matter of national concern, an essential part of interstate commerce, and a wholly distinct and different thing from a local rate, and that it is illegal in principle to subject it to any local rule or local regulation, even though the same be a local rate of 9 cents imposed by virtue of a State law. Or, to use the language of the answer (sec. 24, Trans., 36):

"*The local rate charged by the South Carolina railway on hay, from Charleston to Summerville is 9 cents per 100 pounds. The standard tariff of the* SOUTH CAROLINA RAILROAD COMMISSION, *referred to above, allows the railroads of that State to charge, on hay, a rate of 9 cents per hundred pounds, for a distance of 21 miles; and said tariff was adopted as stated above,*

UNDER A LAW *of that State, which authorized and required said* COMMISSION TO MAKE JUST AND REASONABLE RATES."

That the combination of a national interstate rate and a local rate was bound to produce a base metal an alloy, just as certainly as the mixture of silver and lead; that the result of such miscegenation must be injurious and unjust to both national and local traffic.

Driven by the force of this argument, the general outline of which we have given, counsel for the roads filed a supplemental brief in the Circuit Court of Appeals, completely altering his position, as will be seen by the reply we made, which is here inserted in order to prevent any possibility as to confusion or mistake upon the facts of this added local system, which is the root of all trouble as to rates in the South.

In reply to this supplemental brief we said:

"My friend now says the local is imposed by virtue of a "common law power in the Memphis & Charleston R. R. to "employ agents, and pay them 9 cents, or any other sum. "The only trouble about this wholly new contention is that "it is not founded on fact. In truth, it is diametrically op- "posed to my friend's evidence and his admissions, set out "in full at pages 6 to 14, part II, of my brief, in which he "maintains that this is a combination rate. But let us "quote. At p. 13 of my brief we find, sec. 25, of the an- "swer taken from p. 33, Trans., as follows:

"'Respondents aver that the rate of 28 cents per 100 lbs. "on hay from Memphis to Summerville is, as stated above, "a combination rate; that it is arrived at by taking the "joint through rate of 19 cents per 100 lbs. from Memphis "to Charleston, and adding thereto the local rate of the "South Carolina railroad of 9 cents per 100 lbs. from "Charleston to Summerville, thus making a total combina- "tion rate of 28 cents per 100 lbs. from Memphis *via* "Charleston to Summerville.'

"Please observe that the answer says '*via Charleston* to "Summerville.' Now my friend makes a complete change "of front, and says 'the charge referred to is not collected "for a "constructive or imaginary haul from Charleston to "Summerville," but is collected for an *actual* haul from Au- "gusta to Summerville.' (See p. 14, Supplemental Brief.)

"The evidence in this case clearly shows that through rates "are made to Charleston, and, as the answer says, p. 32, "Trans., the S. C. R. R. received, 'in addition to its propor- "tion of said through rate, its local from Charleston to "Summerville.' (See also sec. 24, ans., Trans., 33, p. 13, "Brief.)

"It is too late now, and, in the face of all this, to take the

"position that, under a common-law power, the charge was "from Memphis to Summerville, when it is admitted and "asserted, for the purpose of showing the now exploded "theory, that the carriage was not over the 'same line;' "that no through arrangement existed except from Mem- "phis to Charleston, for which a through charge was made "of 19c., while for the '21 miles' from Charleston to Sum- "merville the local of 9c. was imposed by the South Caro- "lina road alone, and no other road had any interest in it, "or had anything to do with it. Never was a fact more "clearly established than that this was the separate action "of the South Carolina road, and that the other roads had "nothing to do with it in any way, shape or form.

"It may be that the Memphis and Charleston road 'had "the right to employ the South Carolina railway as one of "the "agencies" to complete the transportation;' and it "may be that it had the right to agree to pay the South "Carolina railway the local rate of '9 cents per 100 pounds,' "or $9 per hundred pounds, but unfortunately no such "thing has occurred in this case.

"The roads have themselves taken the pains to prove be- "yond a shadow of doubt that this local was the private "and separate and exclusive business of the South Carolina "railway.

"That they have nothing whatever to do with it; that "they had entered into an agreement as to interstate freight "between Memphis and Charleston and Augusta, but Sum- "merville is not on the list. That point is private to the "South Carolina road.

"They have induced the circuit judge in this case to say: "'It would appear from the evidence in this case that these "'defendants had no common controlling head; that they "'were independent of each other, and that acting inde- "'pendently they had so arranged their charges of freight "'on hay and articles of this character, that 19 cents per "'hundred would be divided between them for transporta- "'tion between Memphis and Charleston. They had similar "'contracts from Memphis to Chattanooga, to Atlanta, to Au- "'gusta. But these contracts did not include any interme- "'diate points. In the case at bar all that was received by "'all these connecting roads was 19 cents per hundred. The "'South Carolina Railway Company shared in this. In ad- "'dition that this railway company charged nine cents be- "'cause the shipment was to Summerville, and this nine cents "'it shared with no one. Strictly speaking, therefore, the de- "'fendants did not charge for anything but transportation "'between Memphis and Charleston. There was no arrange- "'ment between them for any other through rate to any point

"'in South Carolina than Charleston, and no authority in "'any one to change or enlarge the terms of the contract. "'Certainly the shipping agent in Memphis could not do it. "'He may very well have said to one who desired to ship hay "'into South Carolina, and who wished to avoid the local "'rates on each road, I can do this for you; we have through "'rates to competitive points. I can give you the benefit of "'the through rate to Augusta, or I can give you the through "'rate to Charleston. My authority goes no further. I can "'put your freight within reach of you on the South Carolina "'railway, and can bind this road only as to the rate to "'Charleston. When you get it there you may contract "'with the South Carolina Railway Company. The South "'Carolina Railway Company itself could say to its con- "'tracting roads, We are perfectly willing to contract with "'you for a through rate to Charleston. There we meet "'competitive carriers and competing markets, and if we do "'not meet you in lowering the through rates, you, and we "'as well, will lose business. But we will not agree to "'through rates to points where we have no competition, "'and especially to points on our road. Freight to those "'points and charges for transportation are our own busi- "'ness, and no one else is concerned in it' (Trans., p. 110).

"My friend now concedes that an interstate rate is a "matter of national concern, even as to points like Summer- "ville. The circuit judge is left in the lurch, and all the "testimony and all the admissions are ignored, and the "local, instead of being the act of the South Carolina road, "in dealing with its private affairs, is now the act of the "Memphis and Charleston R. R., under its common-law "power to employ such agencies and pay such prices as it "pleases.

"The spectacle is amusing."

There can be no room for doubt, then, as to how this rate of 28 cents complained of in this case is made up. It is a combination rate constructed from the through interstate rate of 19 cents, with the added local of 9 cents.

ADDED LOCAL EXACTED ON THROUGH TRAFFIC UNREASONABLE PER SE. INTERSTATE RATES FOR INTERSTATE TRAFFIC.

The entire fallacy of my friend's position is in asserting that the haul from Memphis to Summerville is local, while the haul from Memphis to Charleston is not, and that the Summerville haul being local, it is reasonable and proper to impose a local rate upon it.

The premise is faulty, as is manifest by the mere fact of mentioning that the haul from Memphis to Summerville in the case at bar was 750 miles, through the States of Tennessee, Mississippi, Alabama, Georgia, and South Carolina. As we have seen above, this court, in the Social Circle case, held it was not local.

This is an interstate through haul and not local in any sense. Hence, all conclusions predicated on the fact that it is local transportation are obviously erroneous, and among these conclusions is the idea that a local rate prevailing in South Carolina and made and constructed for local conditions in that State can be imposed on this traffic.

As restricted to a transportation which begins and ends within the limits of the State, this nine-cent local may be very just and equitable, but, as Mr. Justice Miller said in the Wabash case (188 U. S., 577), when it is attempted to apply it to a charge for transportation through an entire series of States, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated.

In the case of Augusta S. R. Co. *vs.* Wrightsville & T. R. Co., 74 F. R., 522, the Circuit Court, Judges Pardee and Speer, sitting together, passed on this very point of local rates applied to through traffic.

At page 527 the court says:

"Nor does it follow, as insisted for the respondent, that "the full local rate permitted by the State law is, in the "absence of a contract between the roads for through ship- "ment, a just or reasonable rate on freight plainly not local, "but through freight. Why is it reasonable that a railroad "company should charge a higher rate for local than for "through shipments?

"In King *vs.* Railroad Co., 4 Interst. Com. Com. R., 262, "we find this clear proposition: 'The local rates are made "'for many trains that run slow, stop generally at every "'station, delivering and taking on freight, chiefly in parcels "'not loaded or unloaded by the shippers or consignees, but "'loaded or unloaded by the servants of the company. "'They, of course, carry freight occasionally in car-loads to "'local points. Such shipments are, of course, much more "'expensive than through freights, and for such services an "'additional charge is reasonable, and the laws permit it.'

"*But no fair or equitable construction will justify the exaction "of local rates for freights not local, where the services belonging "to local rates is not offered;* * * *" (Italics mine.)

The local rate in this case was $2.76 per ton, and the court goes on to ask: "Is the rate of $2.76 a ton on freight in

"itself not local, but through freight, *per se* unreasonable? "As we are now informed we think it is" (74 F. R., 527).

In the recent case of Northern Pac. R'y Co. *vs.* Keyes, 91 F. R., 47, Thayer, circuit judge, and Amidon, district judge, sitting together, the court says, at pages 53 and 54, that local traffic is always more expensive to handle than through traffic: "It costs as much to bill and pass through the "records of the company a box of merchandise paying a "freight charge of 50 cents as it does to perform the same "service for a car load of wheat paying a revenue of $75. "Furthermore, the great volume of traffic is loaded by the "shipper and unloaded by the consignee, while local freight "has to be stored, loaded, and unloaded by the carrier."

"Many witnesses were called by the plaintiffs to testify in "respect to the relation of cost to revenue in the case of local "business as compared with the entire business of the com- "panies. By none of them is the expense of conducting "transportation placed at less than twice as much in the "former case as in the latter. Mr. Erling, the general man- "ager of the Milwaukee road, a person of great experience "and apparent candor, stated that the cost of conducting "local business on the entire system of that road was at least "twice as great as for through business, and that in sparsely "settled communities, like North Dakota, where traffic is "light, such cost was four or five times as great in the one "case as in the other. This was also the testimony of Mr. "Fink in the Nebraska case, a witness whom both the cir- "cuit and supreme court mention as possessing peculiar "qualifications for giving a trustworthy opinion upon such "matters."

In this case following the decision of this court in the Nebraska Maximum Rate case (Smythe *vs.* Ames, 169 U. S., 431) the Dakota court enjoined the board of railroad commissioners of North Dakota from subjecting any part of the interstate traffic of the roads of that State to a local *infra*-state tariff.

In the case of Smythe *vs.* Ames, 169 U. S., 466, this court also found that local traffic was more expensive (p. 529).

This decision is conclusive upon the question that it is unreasonable to subject interstate traffic to local rates, and that national and local traffic are wholly and essentially distinct and separate, and that the rates for each must be based upon their own peculiar inherent circumstances without reference at all of the one to the other.

As stated by the Circuit Court for North Dakota, *supra:*

"This is the most important feature of the decision in "that important case. The other questions discussed in the "opinion had all been passed upon by former decisions of the

"court; but this clear and complete separation between the "local and interstate traffic of a carrier conducting both "kinds of commerce, though following as a necessary con- "clusion from the commerce clause of the Federal Constitu- "tion, had not before been expressly declared."

There must be local rates for local business, based solely on that business, and interstate rates for interstate business, and the interstate traffic cannot be subjected to local rates, which if too low are destructive to the carrier, and if too high are injurious to the public.

At pages 540, 541, 542, 169 U. S., this court says:

"It is further said, in behalf of the appellants, that the "reasonableness of the rates established by the Nebraska "statute is not to be determined by the inquiry whether "such rates would leave a reasonable net profit from the "local business affected thereby, but that the court should "take into consideration, among other things, the whole "business of the company, that is, all its business, passenger "and freight, interstate and domestic. If it be found upon "investigation that the profits derived by a railroad com- "pany from its interstate business alone are sufficient to "cover operating expenses on its entire line, and also to meet "interest, and justify a liberal dividend upon its stock, may "the legislature prescribe rates for domestic business that "would bring no reward and be less than the services ren- "dered are reasonably worth? Or, must the rates for such "transportation as begins and ends in the State be estab- "lished with reference solely to the amount of business done "by the carrier wholly within such State, to the cost of doing "such local business, and to the fair value of the property "used in conducting it, without taking into consideration "the amount and cost of its interstate business, and the value "of the property employed in it? If we do not misappre- "hend counsel, their argument leads to the conclusion that "the State of Nebraska could legally require local freight "business to be conducted even at an actual loss, if the "company earned on its interstate business enough to give "it just compensation in respect of its entire line and all its "business, interstate and domestic. We cannot concur in "this view. In our judgment, it must be held that the rea- "sonableness or unreasonableness of rates prescribed by a "State for the transportation of persons and property wholly "within its limits must be determined without reference to "the interstate business done by the carrier, or to the profits "derived from it. The State cannot justify unreasonably "low rates for domestic transportation, considered alone, "upon the ground that the carrier is earning large profits "on its interstate business, over which, so far as rates are

"concerned, the State has no control. Nor can the carrier "justify unreasonably high rates on domestic business upon "the ground that it will be able only in that way to meet "losses on its interstate business. So far as rates of trans- "portation are concerned, domestic business should not be "made to bear the losses on interstate business, nor the lat- "ter the losses on domestic business. It is only rates for the "transportation of persons and property between points "within the State that the State can prescribe; and when it "undertakes to prescribe rates not to be exceeded by the car- "rier, it must do so with reference exclusively to what is "just and reasonable, as between the carrier and the public, "in respect of domestic business. The argument that a "railroad line is an entirety; that its income goes into, and "its expenses are provided for, out of a common fund; and "that its capitalization is on its entire line, within and "without the State, can have no application where the State "is without authority over rates on the entire line, and can "only deal with local rates and make such regulations as "are necessary to give just compensation on local business."

As said by the court of North Dakota, *supra*, this complete separation of interstate traffic from *infra* state traffic is a necessary conclusion from the commerce clause of the Constitution, and it is the logical result from all the cases that interstate rates and local rates must be separately made and based upon their own peculiar circumstances.

The Nebraska case is the first direct announcement of that fact.

In view of the Nebraska decision it is unnecessary to review the older cases, so we will proceed to discuss other features of the added local.

ADDED LOCAL UNCONSTITUTIONAL.

The testimony of petitioner corroborated by General Manager Ward, a witness for the roads, shows that this freight from Memphis was not carried to Charleston, but was switched off at Summerville (Trans., pp. 51–75).

Thus, 9 cents per hundred was charged and collected for a purely imaginary constructive haul from Charleston to Summerville. It is to be remembered that this was in addition to the through charge of 19 cents per hundred pounds from Memphis to Charleston, thus including a charge for the constructive imaginary haul from Summerville to Charleston. In other words, the charge was made in contemplation of a journey of 22 miles past Summerville to Charleston and then 22 miles back again, thus making an extra and unnecessary journey of 44 miles. The goods were shipped

on a through bill of lading directed to Summerville and not to Charleston (Trans., p. 82). A through bill of lading or a through ticket means a through and direct journey. To carry them beyond would be an "unconstitutional hindrance "and obstruction of interstate commerce."

In the case of The Illinois Central Railroad Company *vs.* The People of the State of Illinois, 163 U. S., p. 153, it is said by the court:

"The effect of the statute of Illinois, as construed and ap-"plied by the supreme court of the State, is to require a fast "mail train, carrying interstate passengers and the United "States mail from Chicago, in the State of Illinois, to places "south of the Ohio river, over an interstate highway estab-"lished by authority of Congress, to delay the transportation "of such passengers and mails, by turning aside from the "direct interstate route, and running to a station three miles "and a half away from a point on that route, and back again, "and thus traveling seven miles which form no part of its "course, before proceeding on its way; and to do this for "the purpose of discharging and receiving passengers at "that station, for the interstate travel to and from which, as "admitted in this case, the railroad company furnishes other "and ample accommodation.

"This court is unanimously of opinion that this require-"ment is an unconstitutional hindrance and obstruction of "interstate commerce, and of the passage of the mails of the "United States."

Therefore it is clear that to carry this interstate freight to Charleston and back again to Summerville, an extra journey of 44 miles, when its destination is Summerville, on a through bill of lading made out expressly to that place, would be an "unconstitutional hindrance and obstruction of interstate commerce."

It is obvious that if the haul itself is unconstitutional, any charge for such a constructive haul is unconstitutional.

Increase of a rate may be a burden and obstruction on interstate commerce (Wabash case, 118 U. S., 557; Covington Bridge Co. *vs.* Kentucky, 154 U. S., 217).

ADDED LOCAL UNREASONABLE BECAUSE IT CHARGES FOR TWO VOYAGES IN REALITY BUT ONE.

In the Wabash case (118 U. S., 571) the Supreme Court, speaking "of a continuous transportation of goods from New York to central Illinois or from the latter to New York," says:

"Whatever may be the instrumentalities by which this

transportation from one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi river."

It is therefore free from "*local rules and local regulations*," * * * "concerning the *price, compensation* or taxation, or any other restrictive regulation" * * * as to "*fares and charges*" and "*rates of transportation*" (118 U. S., 572–577).

"The transportation of a passenger from Liverpool to the city of New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city" (*Henderson vs. Mayor of New York*, 92 U. S., 271).

The carriage of goods from Memphis to Summerville, on a through bill of lading, as one continuous shipment, is one voyage.

The single voyage from Memphis to Summerville is not completed until the goods are disembarked, and no *local* regulation of any description can be imposed before the voyage is completed.

Under the present system there are two separate charges for two separate and distinct voyages, one from Memphis to Charleston on a through interstate rate, and another from Charleston to Summerville on a strictly local rate, participation in which is repudiated by all carriers west of Augusta.

Yet the goods are carried as one through shipment, on a through bill of lading, reading not from Memphis to Charleston, but from Memphis to Summerville (Trans., p. 82).

There should be one charge for one voyage. There must be interstate rates for interstate traffic. We think that if interstate rates were expressly made by the carriers for interstate traffic, it would lessen the undue discrepancies between one interstate point, such as Summerville, and another interstate point, such as Charleston, as to "*the price, compensation*," "*fares and charges*" and "*rates of transportation*" on goods emanating from the same point in another State, such as Memphis, Tenn. Of course, it goes without saying that we do not seek to have the roads carry at unreasonably low rates to any point; but we think beyond question it is only reasonable to require them to make interstate rates to interstate points on a strictly interstate basis when they carry interstate traffic on through bills of lading. That the result of this would be far more reasonable and just than the results of the present system is our firm belief.

As my friend delights to deal in familiar examples and object lessons, we offer the following:

If a tailor cuts a piece of cloth to make a suit for a 6-foot man, it may fit the man. If he cuts the cloth for a 3-foot boy, it may fit the boy. But if he attempts to cut it so as to

make a "combination" suit that will fit at the same time a 6-foot man and a 3-foot boy the result is apt to be unique.

Our contention is only that this "combination rate," produced by a mixture of an interstate or national rate, and an intrastate or local rate, is incongruous, unscientific, grotesque, and unreasonable.

The request that interstate rates be made on an interstate basis is our only request, and a very reasonable one, and it is done in the East, West, the North, and parts of the South, with beneficial results.

ADDED LOCAL EXACTS FOUR TERMINAL CHARGES FOR ONE JOURNEY, THUS BURDENING INTERSTATE COMMERCE TO THE EXTENT OF MILLIONS.

The rate of 9 cents per 100 or $18 per car-load made for local traffic wholly within the State by the South Carolina railroad commission includes, as a matter of course, two terminal charges.

Mr. A. B. Stickney, in his work on "The Railway Problem," hereinbefore cited, says:

"There are two principal divisions of the expenses of "railway transportation: (1) The cost of terminal or station "work. (2) The cost of handling. As every shipment re- "quires station-work, at both the forwarding and receiving "station, and as these station expenses are the same whether "the haul is a few miles or five hundred miles, it follows "that the rate per ton per mile must be materially greater for "the short haul than for the long haul."

The rate of 19c. per hundred or $38 per car load from Memphis to Charleston also includes two terminal charges.

Thus the haul in this case, although it is only one voyage or journey, is subjected to four terminal charges, notwithstanding the freight is carried only between one point and another—that is, between two terminals.

Mr. Stickney says:

"From a somewhat exhaustive examination of statistics, "the writer concludes that a fair charge for each terminal "expense in the standard average rate would be about 60 "cents per ton; and as every shipment is subject to two "terminal charges, one at the forwarding and one at the "receiving station in making such a schedule, $1.20 per ton "to cover these expenses should be the least charge" (The Railway Problem, by A. B. Stickney, p. 191).

It must be remembered that under the practice and according to the terms of the Southern Railway and Steamship agreement (Trans., p., 93, art. 1, sec. 1) all traffic to a point

on any road, such as the one in the case at bar, is treated as a local at that point, even though the goods originated in San Francisco or Alaska, and the local rate is exacted, thus imposing two terminal charges for the interstate haul and two more terminal charges under the local rate, making four terminal charges in all, for one voyage or journey.

The enormous tax or burden upon commerce in this section can well be imagined, for it has been estimated that a reduction of 1 mill per ton per mile throughout the United States would relieve trade from $100,000,000 per year.

The imposition of two extra terminal charges, amounting to $1.20 per ton—taking Mr. Stickney's figures as correct—on all the interstate traffic delivered in this section must be prodigious.

In the Nebraska case this court held that a State had no power to add to the burdens of interstate commerce by reducing one-twentieth of the income of interstate roads. It would assuredly hold that the State has no right to add to the burdens of interstate commerce by imposing high local rates to be collected in addition to through rates.

What the sovereign cannot do a lesser person cannot do, and the railroads are not greater than the States.

In the celebrated Debs case, 158 U. S., p. 581, the Supreme Court of the United States says:

"It is curious to note the fact that in a large proportion "of the cases in respect to interstate commerce brought to "this court the question presented was of the validity of "State legislation in its bearings upon interstate commerce, "and the uniform course of decision has been to declare "that it is not within the competency of a State to legislate "in such a manner as to obstruct interstate commerce. If a "State with its recognized powers of sovereignty is impo- "tent to obstruct interstate commerce, can it be any mere "voluntary association of individuals within the limits of "that State has a power which the State itself does not pos- "sess?"

ADDED LOCAL SYSTEM VIOLATES RULE AS TO UNIFORMITY.

In Leisy *vs.* Hardin, 135 U. S., 112, this court says through the chief justice:

"But the transportation of passengers or of merchandise "from one State to another is in its nature national, ad- "mitting of but one regulating power; and it was to guard "against the possibility of commercial embarrassments "which would result if one State could, directly or indi- "rectly, tax persons or property passing through it, or pro-

"hibit particular property from entrance into the State, "that the power of regulating commerce among the States "was conferred upon the Federal government."

"In the matter of interstate commerce the United States "are but one country, and are and must be subject to one "system of regulation, and not a multitute of systems."

Robbins vs. Shelby Taxing Dist., 120 U. S., 494.
Stoutenburgh vs. Hennick, 129 U. S., 141.
The Brimson Case, 154 U. S., 471.
Bowman vs. Chicago R'y Co., 125 U. S., 480.
Wabash R'y vs. Illinois, 118 U. S., 557.
Covington, &c., Bridge Co. vs. Kentucky, 154 U. S., 217.

In Gibbons *vs.* Ogden, 9 Wheat., 8, Daniel Webster said it would not be waste of time to point out the varied purport and effect of the several State laws as to the use of "steam and fire" in navigating the Hudson, and proceeded to show that in the waters of New York a vessel not having a license to use "steam and fire" would be forfeited. Going from New York or elsewhere to Connecticut, she would be prohibited from entering the waters of the latter State if she have such license, and in New Jersey still another system of regulations were made.

So here we call the attention of this court to these facts set out in the pleadings as aptly illustrating the intolerable uncertainties and differences to which interstate traffic would be subjected if local regulations were permissible. In their answer at page 34 of the Record the roads say:

"15. Respondents aver that the law of the State of Georgia authorizes and requires the railroad commission of that State 'to make reasonable and just rates,' to be observed by all the railroads of that State. Said commission has adopted and published a standard tariff, which is a scale of freight rates to be charged by railroads in Georgia; said scale runs from one to four hundred and sixty miles. Said rates increase with the distance, but not in exact proportion with the distance. If said scale of rates were carried forward to seven hundred and fifty miles (the distance from Memphis to Summerville) a rate on hay of 31 cents per 100 pounds for 750 miles would result, which is 3 cents per hundred pounds more than the rate actually charged from Memphis to Summerville.

"16. Respondents aver that the law of the State of South Carolina authorizes and requires the railroad commission of that State 'to make reasonable and just rates,' to be observed by all of the railroads in that State. Said commission has adopted and published a standard tariff, which is a scale of freight rates to be charged by railroads in South

Carolina. Said scale runs from one to 350 miles. Said rates increase with the distance, but not in exact proportion with the distance. If said scale of rates were carried forward to 750 miles (the distance from Memphis to Summerville), a rate on hay of 35 cents per hundred pounds for 750 miles would result, which is 7 cents per hundred pounds more than the rate actually charged from Memphis to Summerville."

So we have the Georgia system producing a rate of 31 cents and the South Carolina system producing a rate of 35 cents per hundred on the same commodity, carried in the same cars, over the same rails, for the same distance, in the same direction, between the same points, at the same time. The rate produced by the Tennessee system would, perhaps, be still different, and so through all the States.

This is precisely what is forbidden, and precisely the condition of affairs that makes a uniform system of regulations a necessity to prevent the "commercial anarchy and confusion" that would otherwise result, to borrow a phrase of Mr. Justice Matthews in Dow *vs.* Beidleman, 125 U. S., 580.

It goes without saying that appellee does not contend that precisely the same rates should prevail all over the United States. That is not the meaning of the decisions requiring a uniform system, nor would it be the result of a uniform system of rate-making.

A uniform system would give rates reasonable and suitable to the different sections of the country, but would prohibit a variety of rates in the same section as is now the case. The interstate goods delivered in Georgia being subjected to one set of locals, the goods delivered in Tennessee being subjected to another set of locals, the goods delivered in Alabama being subjected to still another, the goods delivered in South Carolina to another, and so through all the States.

Nor is our demand one that interferes with the right of the roads to adjust their own rates. We simply ask that they adjust them on a strictly interstate basis when they carry interstate freight.

The practice in this region differs from that prevailing in the North, the East, and the West, and here certain towns are taken as "basing points" or "trade centers," and these receive the through rate, a local being added to intervening places.

Judge Cooley says:

"The pre-eminence of such trade centers in the territory "reached by the petitioner's roads is *peculiar*, and has prob-"ably been increased by the concessions in rates which the

"railroads have made to them, while making less conces-
"sions, or none at all, to less important stations" (*In re* L. & W. R. R. Co., 1 I. C. C. Rep., 84. See also Crews *vs.* Richmond & Danville R. R., 1 I. C. C. Rep., 407; also *In re* Tariffs and Classifications, Atlanta & W. P. R. R., 3 I. C. C. Rep., 19.)

The commission has said:

"* * * It is unnecessary here to discuss the question of
"the propriety of the practice which *prevailed so extensively*
"*in the territory covered by the Southern Railway and Steam-*
"*ship Association* of making rates by adding locals to the
"established rate to 'basing points.'

"The inherent defect in making these rates is that the
"railroad companies treat traffic intended to be continuous
"between interstate points as consisting of two kinds of
"service, independent of each other, the one to the basing
"point on a through rate, and the other from the basing
"point to an intermediate point on a local rate."

ADDED LOCAL SYSTEM VIOLATES AXIOM OF RATE-MAKING.

Diagram E shows the contravention of a well-recognized rule of transportation, not laid down by the act to regulate commerce, but universally acknowledged the world over, that the rate per ton per mile decreases with the distance, while the aggregate charge increases. We merely call attention to this to show one of the effects of this added local system, we think an unscientific as well as unlawful system.

"It is axiomatic that the rate per ton mile rapidly de-
"creases as the length of haul increases" (Northern Pac. R'y Co. *vs.* Keyes, 91 F. R., 56).

(Here follows diagram marked E.)

EFFECT OF ADDED LOCAL INJURIOUS TO BOTH PUBLIC AND ROADS. ABANDONMENT WOULD BENEFIT THE LATTER.

In I. C. C. *vs.* E. T., V. & G. R'y Co., 85 F. R., p. 113, Judge Severens says:

"The railroads cover the country like a web. Only the
"unproductive and inaccessible places are isolated from
"their routes. The places where they meet and cross
"each other, and thus come in competition, are almost
"innumerable. They are thickly located in all the com-
"mercial parts of the country. If the fact of such com-

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

"petition is allowed to become a dominating factor in "fixing the relative charges of transportation to the dif- "ferent places along the lines, those communities where "there is no competition must be blighted by the disadvan- "tage with which they are burdened, and the favored places "grow prosperous in the sacrifice of others. Counsel for the "respondents, after noting the wider distance between com- "petitive points in the southern portion of the country, says:

"'It is not unusual for a southern railroad to run for a "'hundred miles from one competitive point to another, "'where the intervening territory is very poor and sparsely "'settled. The distance between such competitive points is "'so great that it is practicable for railroads to make a greater "'charge for a shorter than for a longer haul.'

"With this as the rule in adjusting rates, it seems certain "that the poor places must become poorer and the localities "more sparsely settled than ever. At least, this would seem "to be the very probable tendency. And although I must "express an opinion upon a mere question of policy for the "carriers with much diffidence, I am very strongly inclined "to the belief that their interests would in the long run be "better promoted by adhering more closely to the rules of the "statute than was done in the present case or is likely to be "done under the practice which their counsel endeavors to "justify. And public policy would also be advanced by the "opposite course, not only in the encouragement which "would thus be given to the distribution of commerce and "population, but also in extending that equality of privilege "which it is one of the prime objects of legislation to pro- "mote."

Expert and leading railroad men and statistics bear Judge Severens out. Speaking of a similar practice prevailing in the North and West prior to the adoption of the interstate commerce act, Mr. Stickney in his Railway Problem, pp. 61 and 62, says:

"These tariffs once established, year by year the rate at "competitive points gradually sank lower and lower. These "reacted to a certain extent upon non-competitive rates; "for, as the difference increased the logic of figures began to "assert its influence. By sophistry men might appear to "justify a difference, but when the rate for hauling a ton of "freight 400 miles was only say one-third of the rate for "hauling a ton 200 miles over the same road, it seemed too "absurd, and it was usually remedied by lowering the higher "rate.

"If it be found impossible, in the light of the present day, "to justify these methods either on business principles or "on the selfish plea of advantage to the companies, it must

"be admitted that they were strictly in accordance with "precedents which had been established by older companies "in older communities, and therefore it ought to be con- "ceded that the managers in establishing them might have "been unconscious of acting against the best interests of "their companies. Indeed, it was not immediately ap- "parent that they were prejudicial to the companies. "At that time the amount of business at competitive "points, compared with the business at non-competi- "tive points, was relatively less than it is now; there- "fore since the non-competitive rates were held up, the "cutting of competitive rates only slightly affected the ag- "gregate revenues. But when the discriminating tariff "continued in force it was found that year by year, more "and more business centered at the points of competition. "Every new manufacturing establishment, new business "ventures of every kind, and consequently population, "sought such localities as a matter of course. Statistics "show that the entire net increase of population from 1870 "to 1890, twenty years, in Illinois, Iowa, Wisconsin, and "Minnesota (except the new section which has not yet felt "the effects of discrimination) was in cities and towns pos- "sessing competitive rates; and further, that all the non- "competitive towns and villages decreased in population. "Thus it happened, as time passed, that the depleting effect "of these methods upon the railway treasuries became more "apparent as the population and business of non-competitive "territory decreased."

The case at bar shows clearly the effects of this false system. At pages 50, 51, Trans., we find:

"Q. Mr. NORTHROP: What is your business?

"A. Mr. BEHLMER: Wholesale hay and grain.

"Q. Mr. NORTHROP: Do you propose to do a larger busi- "ness in Summerville?

"A. Mr. BEHLMER: If I get the rates.

"Q. Mr. NORTHROP: In what way?

"A. Mr. BEHLMER: On car-load lots.

"Q. Mr. NORTHROP: And you think of going into manu- "facturing enterprises there?

"A. Yes, sir.

"Q. Why cannot you do that now?

"A. The rate is too great.

"Cross-examination by Mr. BAXTER:

"Q. Where do you expect to sell the products of the mill "you expect to start?

"A. In Summerville and a little higher up.

"Q. You expect to ship it away?

"A. Yes, sir.
"Q. To what points?
"A. To Georgia stations."

So the present rates stifle the enterprise of a flour mill in this town.

In their eighth annual report to Congress for 1894 the commission make special mention of the case at bar, and, amongst other things, say (pp. 19 and 20, Ann. Rep., 1894, I. C. C.):

"The defendants carried hay in car-loads from Memphis, "Tenn., through Summerville to Charleston, S. C., for 19 "cents a hundred, while they charged the complainant 28 "cents a hundred on car-load shipments from Memphis to "Summerville, the 9 cents difference being equal to the "local rate in force for carrying hay from Charleston back "to Summerville. It was evident that this difference of "$1.80 per ton was sufficient to preclude the complainant, "engaged in business at Summerville, from buying hay and "selling and reshipping it to other points in that section in "competition with Charleston dealers. The Charleston "competitor could usually afford to sell to the same cus- "tomer for what the hay cost the complainant. The Summer- "ville dealer was thus practically confined to Summerville "for a market, and even there had to compete on even terms "with dealers doing business at Charleston, 19 miles away.
"* * *

"Correction of methods of rate-making which tend to "encourage business monopoly is a leading object of the "act; and the commission, by its construction and applica- "tion of the law, and especially the fourth section, endeavors "to accomplish that object. We believe, moreover, that "the true interests of the carriers would be materially ad- "vanced if they should heartily endeavor to promote this "purpose of the statute.

"The policy generally adopted by southern carriers, of "fixing rates to so-called competitive stations, and making "rates to intermediate or local points by adding local or "arbitrary rates to rates in force to such competitive points, "an illustration of which is furnished in this Summerville "case, generally results *in preventing the development* "*business enterprises at the intermediate or local points, and* "*greatly retards their growth.* The carriers assert that they "are forced into this policy by the competition of other "carriers, and rely for their justification upon this alleged "necessity.

"We hold that the competition of carriers cannot justify "relative rates which *prevent or destroy the natural competi-* "*tion of communities* or unduly discriminate between persons;

"*that this policy of the southern carriers inflicts these injuries* "*in marked degree,* and is therefore unwise and unlawful. "In so far as the competition of carriers promotes the welfare "of persons and places without undue injury to other per- "sons and places, it should be encouraged; but when such "competition plainly operates to destroy or prevent the "growth of one town and build up another, it should be "justly regulated."

That eminent jurist and text-writer, Judge Cooley, speaking of this "trade center" or "basing point" system, says (*In re* L. and N. R. R., 1 I. C. C. R., 31): "This condition of "affairs tends to perpetuate itself, and the disparity of rates "as between competitive and non-competitive towns, the "former being trade centers, must have had some influence "to increase steadily the *disparity in growth and prosperity.*

"* * *

"*One result is that towns recognized by railroad managers as* "*trade centers come to be looked upon* as towns with *special* "*privileges,* and other towns strive for recognition as such, "and complain perhaps of injustice when they fail. It was "made very clear by the evidence produced in behalf of the "railroads that the exceptionally favorable rates which were "given to certain localities were in some cases *given to build* "*up trade centers,* and as they had had that effect and large "establishments had been located at such centers, invited "by the favoring rates, it was urged that there would be in- "justice in now compelling the roads to go back to the rule "of equality. Of this it may be said, *first,* that as between "different localities it is no sound reason for discriminating "in favor of one as against another that the purpose is to "build up the favored locality as a trade center, and, *second,* "*if the discrimination has existed and has had its effect, the fact* "*that large establishments have* thereby been encouraged is no "reason why the injustice should be perpetuated. *This* "*statute aims at equality of right and privilege, not less between* "*towns than between individuals, and it will no more sanction* "*preferential rates for the purpose of perpetuating distinctions* "*than of creating them.*"

Mr. Aldace F. Walker, now high in railroad circles, said: "The result of the system was that rates quite reasonable, "and in some cases low, were given to and from basing "points, and that goods were thence distributed at high "local charges in all directions. For example, the rates "from New York or Chicago to Atlanta, plus the rate from "Atlanta to local points north, east, south, and west there- "from, were the rates charged from New York or Chicago "to the latter points direct; and the latter rates were usually "very much in excess of rates to distributing points situated

"at a greater distance over the same line in the same direc-
"tion. *While this method was satisfactory to the centers which*
"*it created and maintained*, the smaller towns and rural
"communities protested against a system which worked so
"obviously to their disadvantage. Since the passage of the
"act the number of these favored localities has decreased in
"the Southern States, and upon many of the lines the dis-
"parity in rates as between them and intermediate or local
"stations has been diminished. So far as passenger traffic
"is concerned the rates are generally, if not universally,
"upon a mileage basis, except upon a few of the weakest
"roads they are three cents per mile" (3 I. C. C. R., 24).

It is the fate of all systems founded on a false basis to carry many curious and injurious results in their train, and although we have perhaps already said quite enough on this point, yet, as the circuit court below seemed to lay some stress on the idea, and, in fact, said "such a construction as is now sought would destroy competition, the life of trade," we will cite just one more passage from Judge Cooley (in Martin *vs.* Chicago, B. & O. R. R. Co. *et al.*, 2 I. C. C., p. 44, 45). He says:

"An obvious embarrassment in attempting to provide for
"and protect the claim made on behalf of trade centers is
"that it is impossible that there should be any general
"agreement as to the towns which can be regarded as such
"trade centers. Indeed, in the nature of things, it is quite
"out of the power of any one to point out any test by which
"we may classify those which are and distinguish them
"from those which are not. The classification cannot be by
"size merely, for all trade centers are at some period small,
"and if the classification is by amount of business it will
"sometimes be found that a small town is, in some articles,
"if not in all, doing a much larger jobbing business than
"another which is considerably greater. It often happens
"that a small town will have a large business in the manu-
"facture and sale of some one article, and perhaps be as
"truly a trade center for that article as some other town ten
"or twenty times as great; but the small town which has
"begun a general jobbing trade with the hope and prospect
"of a great growth is not likely to perceive any justice in
"being kept from the fulfilment of its hopes *by competition*
"*being precluded* through the more advantageous rates which
"are given to the larger town which it aspires to rival. *If*
"*equal rates will enable it to compete, its business men are very*
"*certain to think themselves wronged if they are not given such*
"*rates.*" (Italics mine.)

In view of this undoubted fact, proved by the evidence in this case and ascertained in many investigations by the

Interstate Commission, may we not say in reference to the position taken by the learned circuit court below, such a construction of the law not only would but actually does destroy competition, the life of trade.

In the case of The Union Pacific Company *vs.* Goodridge (149 U. S., p. 690) the Supreme Court says that the act to regulate commerce was designed "to cut up by the roots the entire system of rebates and discriminations in favor of *particular localities*, special enterprises, or favored corporations, and to put all shippers on an absolute equality," and the court also pertinently refers to the fact that carriers "deriving their franchises from the legislature and *depending upon the will of the people for their very existence* are bound to deal fairly with the public * * * and to put *all their patrons upon an absolute equality.*"

Mr. Aldace F. Walker, heretofore referred to, in an opinion of the commission prepared by him in the case entitled "*In re* Tariffs and Classifications of Atlanta and West Point Railroad *et al.*" (3 I. C. C. R., pp. 48, 49), says:

"The chief obstacle in the way of a general compliance "with the rule of the fourth section is found in the question "of revenue. *Carriers in the Southern States employ that "argument in every case when conformity to the law is suggested. "They say that the railroads must live or there can* be no com- "merce by rail, and they insist that any reduction of rates "means loss of revenue, which is against the public interest "and the carrier's right, unless the rate in question be un- "reasonable *per se.* But it is not clear that the application "of the general rule of the law would involve permanent "loss of revenue. *The stimulus given to business at interme- "diate points will increase traffic largely. That proposition has "been so often practically demonstrated that no intelligent observer "can reject it.* Moreover the adjustment required does not "necessarily involve immediate loss of revenue. An advance "of a single cent, for example, on the various classes and "specials composing the large interstate traffic to and from "Atlanta would compensate the carriers for very consider- "able reductions on the comparatively light interstate traffic "which is now carried to local points on the Atlanta combi- "nation. * * *

"At present the amount shipped to intermediate points is "relatively very small. Giving such points the rates charged "at more distant places, if adopted and maintained as a "general principle, would necessarily encourage local indus- "try and enterprises. Such encouragement would not be at "the expense of the coast points, but would, in its reflex "action and by necessary laws, ultimately work in their "favor also. It is customary for dealers at Baltimore, Phila-

" delphia, New York, and Boston to supply interior towns in " their vicinity by sales to customers there located—deliv- " eries being made by the stoppage of cars en route for the " terminals—at the same rates charged in case they are car- " ried through. The adoption of such a system in the " Southern States would not break up the business of dis- " tributing points; the methods would be somewhat changed. " but the combinations of credit and acquaintance would " maintain existing business relations. The operation of " this system in the Eastern, Northern, and Western States, " by way of developing local communities, has wrought " benefits to the country at large which are obvious to the " most superficial observer."

In Chicago, &c., Railway Co. *vs.* Wellman, 143 U. S., 343, Mr. Justice Brewer, speaking for the court, says:

" May it not be possible—indeed, does not all experience " suggest the probability—that a reduction of rates will in- " crease the amount of business, and, therefore, the earn- " ings?"

ROADS SHOULD BE FREE TO MAKE THEIR OWN RATES, BUT THERE SHOULD BE INTERSTATE RATES FOR INTERSTATE TRAFFIC.

We simply desire that, in accordance with the Nebraska case, there should be interstate rates for interstate traffic.

Our demand does not interfere in the least with the right of the roads to adjust their rates. On the contrary, we wish them to exercise their power more freely. We do not want them to confine this adjustment on interstate traffic to a few points like Augusta and Charleston, but to exercise this power with reference to numberless intervening places besides. They need have no anxiety as to our wishing to curtail their rights, for we are endeavoring to extend them in this particular; and we firmly believe it would be better all round.

Of course we are unprepared to say what figures Summerville would receive on her interstate commerce if the rates were adjusted by the traffic managers of the roads serving her, on a purely interstate basis; but if they are the fair and reasonable men my friend says they are, we have no doubt that as soon as they are convinced that points like Summerville are not local in respect to interstate traffic, but stand on precisely the same footing in this regard as Charleston or Augusta or St. Louis or Chicago, they will then give due weight to all the proper circumstances and conditions to be considered, and while Charleston and Augusta will still have the advantage of more trains, more mails, more

depots, more schedules of arrival and departure—in fact, more facilities of various descriptions—than smaller and less important places, still the rates at Summerville will be better than those she has now. These rates may not be precisely the same as Charleston rates, for various good reasons, which may possibly develop, though they have not been assigned or brought out in this case; but the great and oppressive and hope-killing weight of forever being doomed to be a local point will be removed.

We hardly think we could be more liberal in our views or more modest in our request as to this grievance, that dwarfs and cripples our commerce and stifles and destroys us, and by necessary reaction injures the roads themselves, for the South Carolina road, though the oldest in the United States, instead of passing through thousands of thrifty villages nourished by the wise management and prudent policy of building up the country today in order to be strong and prosperous in the future, has drained and pressed the small places out of existence, crushing them by exactions imposed in a short-sighted and self-destructive effort to reap an immediate fortune, thus killing and cutting off its future sources of income and support.

UNREASONABLENESS OF SUMMERVILLE RATE FROM OTHER STANDPOINTS.

While it follows of necessity that the unjust and unreasonable effects of unlawful methods are themselves proofs of unreasonableness, nevertheless we will now proceed to discuss, on additional grounds, the issue that the rate of 28 cents from Memphis to Summerville is unreasonable.

The first thing that strikes us is that the South Carolina road gets $18 per car-load for doing absolutely nothing. This charge is collected habitually for a purely constructive or imaginary haul from Charleston to Summerville.

(Pages 51–75, Trans.:)

The cars are switched off at Summerville and never reach Charleston at all.

In Smythe *vs.* Ames, 169 U. S., this court, at page 547, after stating what was reasonable from the railroad standpoint, says:

"On the other hand, what the public is entitled to demand "is that no more be exacted from it for the use of a public "highway than the services rendered by it are reasonably "worth."

It will be noted that this court speaks of "services rendered." It is nowhere suggested that a railroad can make a charge for doing nothing.

An overcharge by a public carrier for a public service is unreasonable, according to all authorities from the most ancient times. How to characterize a charge imposed by a public carrier for no service at all we do not know. Mr. Edmunds in his Social Circle brief used the term "extortion;" but in that case it was merely an overcharge for an actual carriage. It must be remembered also that this $18 per car-load is in addition to the proportionate amount of the "through rate" received by the South Carolina road for the constructive "through haul" of 22 miles from Summerville to Charleston.

Now let us examine the situation as to the actual haul of 115 miles on the South Carolina road from Augusta.

It is admitted in section 29 of the answer (Trans., p. 38) that "the joint through rate from Memphis to Charleston of "19 cents per 100 pounds on hay pays to each of the "carriers a small profit over the additional cost incurred by "them respectively in its transportation."

This admission is sustained by the proof, for the S. C. & G. R. R. received $24.40 for carrying the car-load in question, and $18 of this was the amount of the added local, leaving $6.40 for the proportionate share of the through haul.

The evidence as to cost appears in the record as follows (p. 79, Trans.:)

"Q. Mr. BAXTER: Mr. Jackson, what does he show the cost per ton per mile on car-load freight through Atlanta to Augusta, such as these car-loads were?

"A. Mr. JACKSON: This statement made by Mr. Marsh, showing earnings of train No. 6, March 21, 22, and 23, actual earnings of the train, shows the cost per ton per mile on car-load of freight is 4.2 mills per ton per mile; the cost of hauling miscellaneous freight is 8.89 mills in less than car-loads. Miscellaneous means less than car-loads in that sense.

"The CHAIRMAN: This Memphis freight that is in dispute would cost about the same?

"A. Mr. JACKSON: Yes, sir; as I understand your question. You want to know whether it would cost any more or less for Memphis freight than to receive the same freight at Atlanta, Ga.? There would be some increase in cost of transporting if it was received in our depot and loaded in cars at Atlanta. Memphis freight would be carried a little cheaper."

So the cost, then, is 4.2 mills per ton per mile on these car-load lots. There were 10 tons in the car in which Behlmer's hay came (Trans., p. 67).

So if one ton costs 4.2 mills per mile, for 115 miles it would cost .483, and ten tons would cost $4.83. The profit

on the through rate, then, to S. C. & G. R. R. would be $6.40 less $4.83, or $1.57 net on the car-load. That is "*a small* (?) profit" of over 32 per cent. net, for, dividing the net profit of $1.57 by the cost, we have—

$$\begin{array}{r} \$4.83)\$1.5700(.32+ \\ 1449 \\ \hline 1210 \\ 966 \\ \hline 244 \end{array}$$

But to this, in addition, we must put on $18 local charge for the imaginary local haul of 22 miles, and we then have the entire net profit of the S. C. & G. R. R. on this shipment of $19.57, which is not a bad net profit.

In fact it amounts to a net profit of over four hundred per cent. This may, perhaps, seem incredible, so we give the calculation:

Dividing the net profit by the cost, we have—

$$\begin{array}{r} \$4.83)\$19.5700(\$4.054 \\ 19\,32 \\ \hline 2500 \\ 2415 \\ \hline 85 \end{array}$$

Thus, for every dollar expended in cost four dollars and five cents ($4.05) returns as net profit. If a man gets back a dollar net on an investment of 1 dollar he makes 100 per cent., so if he gets back 4 for 1 he makes 400 per cent.

If we divide the gross receipts by the cost we have—

$$\begin{array}{r} \$4.83)24.4000(\$5.05 \\ 24\,15 \\ \hline 2500 \\ 2415 \\ \hline 85 \end{array}$$

That is, over five dollars comes back for every dollar put out, or a return of over 500 per cent. on the investment.

These are facts and not flights of the imagination. We again find ourselves incapable of characterizing this condition of affairs.

It must not be forgotten that these rates are imposed on hay and grain, the great western food products.

The Supreme Court speaks of "corn, the principal product of the country" (Wabash case, 118 U. S., 557), and in another case (Bowman *vs.* Chicago, 125 U. S., 480), says that these products might bear the burden of one local charge, but would be "crushed under the load of many."

At page 684, I. C. C. R., *In re* Excessive Rates on Food Products, we find:

"Wheat is as inexpensive to handle and low in cost of "movement as any other grain, and of necessity is a traffic "which will bear only the lowest reasonable rates and "charges."

"Agricultural products can bear only the lowest possible rate which is reasonable" (*id*, 65).

This fact also appears in the testimony (Trans., p. 74). Here we have, then, a commodity acknowledged on all sides, even by the roads themselves, as requiring the lowest possible rate bearing a tariff that pays for the through haul 32 per cent. net profit to the S. C. & G. R. R., and, with the local added, over 400 per cent. net profit.

In an able article appearing in the September, 1895, number of the *Forum*, entitled "The Benefits of Hard Times," Edward Atkinson, who is by no means an anarchist, says:

"No prudent manager of any manufacturing corporation "or of any business enterprise in which capital has been "invested in costly machinery, ever fails to charge to the "cost of the annual product a full sum for the necessary "depreciation of the plant. How many railway corporations are there which have closed their construction account (except for extensions), and have regularly charged "off year by year a sum sufficient to bring the valuation of "locomotive engines—which, not many years ago, were "rated at over twice what they cost today, cars in proportion; and steel rails which cost $100.00 a ton—down to "the present cash valuation of about seven thousand dollars for the locomotive engine of a more effective kind, "better cars at a similar reduction in cost, and steel rails at "less than twenty-five dollars a ton? Yet is it not in the "interest of the public, and is it not a matter of necessity on "the part of the railway corporation, that their plant on "which they may expect to earn an income shall be brought "down to a valuation representing only what the cost of "that railway would be at the present time, on which only "can any income now be recovered from the service?

"Whatever may be the misfortune to the small fraction "of the population of this country who have a property "interest in railway bonds, or to the yet smaller fraction

" who have any interest in railway stocks, it is nevertheless " an economic necessity that all property of this kind must " be brought down to a cost valuation at the present time, " on which the profit over and above the cost of service may " be maintained at 4 or 5 per cent. per annum, as compared " to a rightly expected profit twenty years ago of 6 to 10 " per cent.

" Turning now to the future: The railway service of the " country is wholly insufficient for its present need. There " may be more than enough through lines, but a very great " amount of railway construction is yet required to bring " the crossway or connecting service of individual States to " anything like a sufficient condition. It is to the great ben- " efit of the country as a whole that the speculative method " of promoting, and the malefactor's method of plundering " the community have been brought to an end. When rail- " way construction begins again, as it soon may, will it not " of necessity be conducted by men of integrity, on a cash " basis with an effort to earn only a reasonable income on a " true investment."

This high authority on economics nowhere suggests that railroads ought to take over 400 per cent. net profit on freight of the lowest grade, or that anything over 4 or 5 per cent. on the true value of the road would be reasonable. He uses rather severe terms as to some of the men and methods of the past, but not more severe than the language of many of the courts throughout the country, notably the language of Mr. Justice Blatchford in the Erie Road case, when Gould had taken the books to Jersey City. However, Mr. Atkinson speaks advisedly, for, after stating that within the past ten or twenty years, there has been little or no difficulty in selecting solvent and properly managed roads from the others, he goes on to say:

" If regard be given to the financial history of almost " every one of the railway systems which have lately become " insolvent, the cause may be readily found, dating in many " cases from the very beginning of the enterprise. The " ordinary rules which govern sound business undertakings " have been wholly disregarded in the lay-out and construc- " tion of a very considerable part of the railway service of " this country. Had any one at any time in the last twenty " years put before investors a manufacturing or commercial " undertaking upon the lines on which railway construc- " tion has been conducted, not a dollar of true capital would " ever have been invested either in the manufacturing " operation or the business thus promoted. What would " have been thought of the promoter of a textile factory, " machine shop, or any other department of productive in-

" dustry, who should have laid before the public a plan for " borrowing money sufficient to pay for the plant on first- " mortgage bonds, thereby incurring a debt equal to the in- " vestment at the very beginning, then issuing as a bonus " an equal or lesser amount of second-mortgage bonds, and " then throwing in the preferred or common stock for a sum " equal to both classes of bonds combined, more or less, " without any payment whatever. Would he not have been " deemed an imbecile or a rogue? Yet that is not an ex- " travagant statement of the way in which many railway " enterprises, now almost all in the hands of receivers, have " been put upon the public.

" Next has followed an effort to recover from the price of " the railway service a full income on both classes of bonds, " and something over, for a dividend on the stock. Success " has sometimes been temporarily attained even in that " undertaking."

This is the secret of much of the trouble, and it is easy to understand why the South Carolina road found it necessary to charge over 400 per cent. net profit on grain, and no one knows what on higher grades of freight, for in the foreclosure proceedings which it has just passed through it was found to be bonded for over twelve millions and a half. The road sold at auction for one million dollars (Trans., p. 123) and could be duplicated for two and a half millions. It is therefore no longer under the necessity of struggling to pay interest on an inflated capital. This is what Mr. Atkinson calls one of the great benefits of hard times.

In the Import Rate case (162 U. S., 197) this court held that in the matter of rates the " welfare of the communities " occupying the localities where goods are delivered is to be " considered as well as that of the communities which are " in the locality of the place of shipment "—that is, the interest of the consumers is not to be lost sight of. In the Freight Tax cases (15 Wall., 274) it was held that the tax would always be added to the cost of transportation and eventually fall on the consumers.

Now, this 400 per cent. net profit comes out of the consumers in Summerville, and it is both to the interest of the producer and the consumer that it be modified or scaled down to some reasonable amount. The roads west of Augusta hauled this car-load 635 miles for $31.60 (Trans., p. 82). At 4.2 mills per ton per mile, this carriage would cost $26.66 per car-load, leaving a net profit of $4.94, which is a little over 18 per cent. net profit. This is perhaps not unreasonable even on a low-grade freight. At all events, it furnishes a strong reason for thinking that the remainder of the haul to Summerville ought not to be made for 400

per cent. Here is a haul in the same territory over the same rails of 635 miles at a profit of 18 per cent. and a haul of 115 miles at 400 per cent.

There is still a further and to our minds powerful, if not conclusive, consideration why the present rate and system should be adjudged unreasonable and unjust.

In the food-product inquiry, which we have referred to so frequently, the commission found that "the Southern States "are large consumers of food products shipped from the "surplus producing region by rail, and, when uninfluenced "by water competition, at rates very much higher than rates "paid for like distances to eastern markets.

"Shipments for local consumption and distribution to "intermediate stations in Pennsylvania are largely made at "Philadelphia rates, in Maryland at Baltimore rates, in New "Jersey and New York at New York city rates, and in the "New England States at Boston rates" (4 I. C. C. R., p. 60).

At page 89 of the Transcript is a list of places in the East and in New England taking the rates given the long-distance point, on this traffic; for instance, it will be seen that Trenton, New Jersey, 56 miles west of New York city, takes the same rate as that city. Cumberland, Maryland, 192 miles west of Baltimore, takes the same rate as Baltimore, and so on.

It will also be observed (at page 90, Transcript) that the rate per ton per mile on grain through all this northern territory is between 4 and 5 mills, and in no instance is it anywhere near 2.1 cents per ton per mile, the rate on the South Carolina road.

It will also be observed that the distance to New York from Chicago is 912 miles, and it exceeds that from Memphis to Charleston by 162 miles—that is, more than the entire length of the whole South Carolina road—and yet the rate for this much longer distance is never more than 20 to 25 cents per hundred pounds.

We respectfully submit, then, that 28 cents per hundred for a haul of 750 miles from Memphis to Summerville is unreasonable.

On the question of a reasonable rate—

In *Reagan vs. Trust Co.*, 154 U. S., 412; *R. R. Co. vs. Gill*, 156 U. S., 657; *Smythe vs. Ames*, 169 U. S., 466, this court held that loss of profit is one of the elements to be considered. The propriety of considering loss of profit necessarily means that there is propriety in considering profit. One cannot be done without the other. Even without authority such an element should commend itself as one entering into the problem. It cannot be that loss of profit to the roads should be considered and too great profit excluded. If the

courts will protect the roads from the one they will protect the public from the other. In truth this court has said:

"The rights of the public are not to be ignored. It is "alleged here that the rates prescribed are unreasonable "and unjust to the company and its stockholders. But "that involves an inquiry as to what is reasonable and just "to the public. * * * The public cannot properly be "subjected to unreasonable rates in order simply that stock- "holders may earn dividends. * * * So that the right "of the public to use the plaintiffs' turnpike upon payment "of such tolls *as in view of the nature and value of the services "rendered by the company are reasonable*, is an element in the "general inquiry whether the rates established by law are "unjust and unreasonable" (Turnpike Co. *vs.* Sandford, 164 U. S., 578).

In *U. S. vs. Trans-Missouri Freight Asso.*, 166 U. S., 290, this court said of railways: "That they all primarily owe "duties to the public of a higher nature even than that of "earning dividends for their shareholders."

In the case of *Canada Southern Railway Co. vs. International Bridge Co.*, 8 App. Cases, 731, Lord Selborne, speaking of a 15 per cent. profit, in giving the opinion of their lordships, says: "They do not say that the case may not be imagined "of the results to a company, being so enormously dispro- "portionate to the money laid out upon the undertaking "as to make that of itself possibly some evidence that the "charge is unreasonable, in reference to the person against "whom it is charged."

In *Rickett, Smith & Co. vs. Midland R'y Co.*, p. 271 Law Rep., part IV, April 1, 1896, vol. I, Q. B., Collins, J., says:

"Neither do I think a dividend of from 5 to 6 per cent. "earned by the respondent so excessive, having regard to "the great capital at risk, as of itself to suggest that they are "extorting unreasonable sums from their customers."

If a dividend of 5 or 6 per cent. is "excessive," but not to the extent of "extorting," as this language would imply, what would the English courts say of a rate that produced over 400 per cent. net?

When profit is so enormous on a low-grade freight as to be extortionate, it becomes an element just as important as the loss of profit amounting to destruction, which the roads urge as of controlling weight.

We take it that these cases settle the law on this point.

We have seen in the Nebraska case that no more is to be exacted from the public than the services "are reasonably worth." Such is also the tenor of the English cases.

In *Rickett, Smith & Co. vs. Midland R'y Co.*, p. 260 Law Rep., part IV, April 1, 1896, vol. I, Q. B., Collins, J., says:

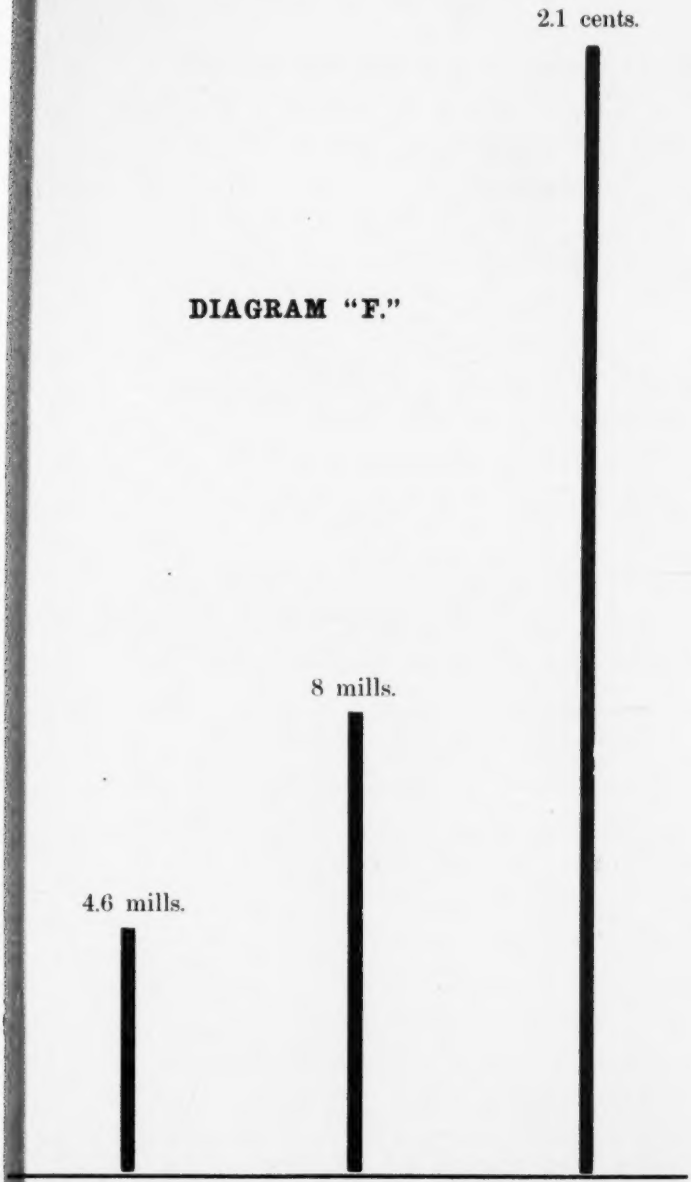
"Their rights, then, are to be ascertained in the same way "as were those of carriers at common law, unfettered by "maxima, but who were nevertheless bound to convey at "reasonable rates. A main element in such determination "must be the expense to the carrier. 'The charge,' says "Parke, B., in a case to which a maximum was inapplicable, "*Pickford vs. Grand Junction R'y Co.*, 'is no doubt to be "varied according to the trouble, expense, and responsibility "attending the receipt, carriage, and delivery of the different "articles.' The affluence or indigence of the person render- "ing or receiving the service is beside the question. The "reasonableness of the charge must be measured by refer- "ence 'to the service rendered and the benefit received.' "(*Canada Southern R'y Co. vs. International Bridge Co.*), which "is unaffected by the prosperity or misfortune of the parties "to the contract."

In view of these decisions, we have endeavored to bring out all the elements that would serve to show what the services were "reasonably worth" to the public in the case at bar:

The value of the service to the shipper on a low-grade freight, one of the principal food products of the country; the value of the service to the consignee, who is to be allowed some margin of profit in handling a freight that will only bear the lowest rate; the value of the service to the consumer, whose interests we have asked the court to consider; the expense to the carrier; his trouble in conveying car-loads as contrasted with lots less than car-loads; the just rights of communities to compete as well as for carriers to do so. The element of distance has also been discussed, and in our moderation we have refrained from insisting that it is entitled to as much weight as we think it ought to have according to the decisions and the act making it a circumstance of great prominence. Comparison with rates charged elsewhere and with methods, to our mind, fairer, more scientific, more in accordance with law, and more beneficial in results to communities and to the carriers themselves, has been made. We have also called the court's attention to the enormous profit to the roads as an element worthy of consideration amongst others.

We have endeavored to give every qualifying circumstance due force in discussing the reasonableness of this rate, and we do not hesitate to say that, considering all the defenses set up and all the facts from every point of view, this 400 per cent. net profit on the lowest grade freight, a prime necessity of life, is the ugliest feature in this case, and, in our opinion, surmounts every other consideration on the point of reasonableness. We do not mean to say that there

DIAGRAM "F."



RECEIPTS PER TON PER MILE.

are not other ugly features, and we hope they will not be forgotten, but this surpasses all.

It seems utterly inexcusable, especially when we consider the criteria laid down in these English cases—that is, "the trouble, expense, and responsibility attending the receipt, carriage and delivery of the different articles."

Here is a case of hay and grain in car-loads—articles the easiest and cheapest to handle, as is well known and as the testimony shows; loaded at Memphis by the most inexpensive, convenient, and modern methods; shipped on a through bill of lading without change of cars to their destination, at a place where there are ample facilities for switching off the cars, involving very little delay and the slightest possible trouble in delivery, all of which fully appears in the evidence, and yet, by reason of a purely imaginary constructive haul, a charge is made, giving a net profit of over 400 per cent. Gauged by the English cases, the charge is so unreasonable that we think Lord Selborne would have said it is "preposterous."

It is respectfully submitted that the evidence sustains the Circuit Court of Appeals in its finding that the rate is unreasonable.

COMPARISON OF RATES CHARGED PER TON PER MILE.

Diagram F shows the rate per ton per mile charged and received by the roads in this case from Memphis to Augusta—that is, 4.6 mills per ton per mile (Trans., p. 67).

The rate per ton per mile from Augusta to Summerville—that is, 2.1 cents per ton per mile (Trans., p. 67).

The average rate per ton per mile received by all the railroads in the United States for 1894—that is, 8 mills.

Statistics of Railways. App., diagram 8.

This was for carrying all freight from the highest to the lowest grades in car-loads and less than car-loads, and it is plain that if the figures were given for hauling hay and grain, the lowest grade freight in car-loads, it would be much less.

However, as it is we see that nowhere in the United States was a charge made of 2.1 cents per ton per mile, and that this rate far exceeds the rate charged for hauling the highest and the lowest grade freight. It seems to us utterly inexcusable.

(Here follows diagram marked F.)

COST.

In the Circuit Court of Appeals, in a supplemental brief, counsel for the roads said it was ridiculous to assume as a basis of calculation the "additional cost," as he called it. This makes it necessary to clearly bring out this cost matter.

We said below:

My friend gives us some additional statistics and items outside of the record as to "cost." He tells us what "additional cost" means. Well, we are glad to learn that "additional cost" means less than "actual cost," and that it is ridiculous to use it as a basis of calculation, and we are very glad that we have not done so foolish a thing.

His witness, Mr. Jackson, in giving us the data does not say a word about "additional cost" or any other kind of cost, but speaks of car-load cost without any qualifications (Trans., p. 79), and my friend did not put any question as to "additional cost." He asked the cost of carrying car-loads "such as these car-loads," meaning Behlmer's (Trans., p. 79). All room for doubt is excluded. His witness gives it to us as to car-load freight. We accept it as correct, notwithstanding Mr. Jackson has said it, and as including every proper item, for he has not confined it to "additional cost."

We know that the receipts per ton per mile throughout the United States for 1894 were 8 mills for all freight (Statistics R'ys 1894, App., diagram 8), and that these receipts furnished the funds to pay all the expenses of all the roads, even if they were itemized by the most expert railroad accountant and his items filled volumes. We know that these receipts must have been more than the cost. They aggregated $820,000,000 in 1894 (Diagram 4, Statistics of Railways 1894, showing "earnings from freight service)." We know that it costs less to carry in car-loads than to carry in smaller quantities. We know that it costs less to carry some freight than it does others (Trans., p. 74). We know that grain is one of the cheapest freights to handle.

We know that Mr. Ward gives us 7.38 mills per ton per mile as the cost of carrying *all classes* of freight (Trans., p. 73).

We know that this includes fruits and vegetables, exceptionally expensive to handle, and lots less than car-loads, also very expensive to handle. We know that it must cost less to carry a low-grade freight, like grain, in car-load quantities than to carry all classes of freight in small and large quantities.

We know that throughout the United States grain is carried at from 4 to 5 mills per ton per mile (Trans., p. 90), and

that it constitutes a large volume of the business of the railroads of the United States, and that they make a good profit on it. We know that a profit is admitted in this case at 4.6 mills per ton per mile (Trans., p. 38).

So we believe that 4.2 mills per ton per mile represents about as near as anything can the cost, including every possible item, of carrying grain in car-loads, and we would not be at all surprised to find that it cost even less. For it must be borne in mind that Mr. Jackson gives us 4.2 mills per ton per mile as the cost of general car-loads. It is evident that it would cost more to carry a car-load of thoroughbred horses than a car-load of grain or coal. So if we had the cost of car-load lots of grain it would very probably be even less than 4.2 mills. This "additional-cost" notion is based principally on the idea that a few stray car-loads of some strange freight, such as a circus, or something of that sort, might be taken over a line to fill out a train already made up. We candidly say we do not take any stock at all in the idea that the South Carolina road conducts three-fourths of its business on an "additional-cost" basis, and yet this is what my friend seems to wish this court to believe. Mr. Ward testifies that three-fourths of the business of this road is made up of this class of freight (Trans., p. 74).

Mr. Stickney scouts this "additional-cost" theory as absurd.

We are not, in this proceeding, at all concerned with a rare case of two car-load shipments in reference to strange and unusual freight. We are dealing with the regular business of the roads, and we think it was quite irrelevant to go into "additional cost" at all. Surely the roads have not presumed to trifle with the court by furnishing ridiculous information. This would be a most impudent confession. They knew the issues, and that we were dealing with three-fourths of their entire freight business, and not with one or two car-loads of, say, Carolina cane-blossoms. The indigenous cane is said to bloom only once every hundred years. If all these enumerated items entered into the cost, why did they leave them out at the hearing and not mention them until this appeal? We certainly were entitled to an opportunity of examining them.

We believe many items go to make up cost, and we further believe that they are all included in this 4.2 mills per ton per mile for hauling a car-load of freight, ascertained by actual experiment in this section.

It may be ridiculous to accept the figures of any railroad accountant, but we will risk it on this point. We doubt very much if they would have concealed the fact of the cost being greater. If it were greater, we think it is not a very

violent presumption on our part to suppose they would have let us know.

THE PROVINCE OF THE COMMISSION.

In Smythe *vs.* Ames, 169 U. S., this court, on the subject of reasonableness, says at page 527:

"Undoubtedly that question could be more easily deter-"mined by a commission composed of persons whose special "skill, observation and experience qualifies them to so handle "great problems of transportation as to do justice both to "the public and to those whose money has been used to "construct and maintain highways for the convenience and "benefit of the people." (See also Brimson case, 154 U. S., 474.)

Experience in England demonstrated that it was better to divest the court of common pleas of the jurisdiction originally conferred upon it and impart same to commissioners, the matters proving so intricate.

Lancashire and Yorkshire R'y Co. *vs.* Greenwood, Law Reports, 21 Q. B., pp. 217, 218.

It has recently been held in England by the House of Lords that "The jurisdiction to determine whether there is "a statutory right to demand from a railway company a "facility or a privilege belongs exclusively to the railway "commission."

Perth Gen'l Station Comm. *vs.* Ross, L. R. App. Cases, 479, for 1897.

CIRCUMSTANCES LAID DOWN BY THE COMMISSION AS TO REASONABLE RATE.

Value of service.—*Re Excessive Rates on Food Products*, 4, I. C. C. R., 48.

Cost of service.—The expense to the carrier in the transportation of freight and passengers is a fact to be considered in determining what is a reasonable rate.

Boston Chamber of Commerce vs. L. S. & M. S. R. R., 1 I. C. C. R., 436; *Rice et al. vs. W. N. Y. & P. R. R. Co.*, 2 I. C. C. R., 389; *Business Men's Ass'n vs. C. & N. W. R'y*, 2 I. C. C. R., 73; *Thurber vs. N. Y. Cen. & H. R. R. Co.*, 3 I. C. C. R., 473; *Boston Fruit & Produce Exchg. vs. N. Y. & N. E. R. R. Co.*, 4 I. C. C. R., 664; *N. Y. B'd of T. vs. Penn. R. R. Co.*, 4 I. C. C. R., 447.

Operating expenses.—These are to be considered.

N. O. Cotton Ex. vs. C. N. O. T. Pac. R'y, 2 I. C. C., 375; *Evans vs. Or. R'y & Nav. Co.*, 1 I. C. C. R., 325.

Character of commodity.—The character of the commodity is one of the elements necessary to the determination of what is reasonable.

Imperial Coal Co. vs. P. & L. E. E. R. Co., 2 I. C. C., 618.

Value.—In determining the reasonableness of a rate the market value of the commodity in question is a fact, among other things, to be considered.

Evans vs. Or. R'y & Nav. Co., I. C. C. R., 325; *James et al. vs. T. V. & G. R'y Co.*, 3 I. C. C., 225; *Harvard Co. vs. Penn. Co.*, 4 I. C. C., 212; *Warner vs. N. Y. Cen. & H. R. R. Co.*, 4 I. C. C., 32; *Delaware State Grange vs. N. Y. P. & N. R. R.*, 4 I. C. C., 588; *N. O. Cot. Ex. vs. Ill. Cen. R. R. Co.*, 3 I. C. C., 534; *Beaver et al. vs. P. C. & St. L. R'y Co.*, 4 I. C. C., 773.

Risk.—In determining what is a reasonable rate, the amount of risk incurred by the carrier during the transportation is, among other facts, to be considered.

N. O. Cot. Ex. vs. Ill. Cen. R. R. Co., 3 I. C. C., 534.

Speed and special train service.—The facts that the shipment of a given commodity demands a special train running at a particular hour and on fast time, and that such train must return empty, are all necessary to be considered in determining what, in such case, is a reasonable rate.

Boston Fruit and Produce Ex. vs. N. Y. and N. E. R. R. Co., 4. I. C. C., 664.

Volume of business.—In considering the question of what is a reasonable rate, the volume of business is a fact, among other things, to be considered.

Boston Cham. Commerce vs. L. S. & M. S. R'y Co., 1 I. C. C. R., 436; *Rice et al. vs. W. N. Y. & P. R. R. Co.*, 2 I. C. C. R., 389; *Warner vs. N. Y. Cen. & H. R. R. Co.*, 4 I. C. C., 32.

Population along the line.—In determining what is a reasonable rate, the density of population along the line is a factor.

Bus. Men's Ass'n of Minn. vs. C. & N. W. R'y, 2 I. C. C., 73.

Amount of through and local business.—In determining what is a reasonable rate for a particular commodity, among other facts to be considered is the relative amount of through and local business.

Evans vs. O. R'y & Nav. Co., 1 I. C. C. R., 325.

Empty cars.—Empty cars and want of return loads is also a fact to be considered.

James et al. vs. E. Tenn., Va. & Ga. R'y C., 3 I. C. C., 225; *Boston Fruit & Produce Exchg. vs. N. Y. Cen. & H. R. R. Co.*, 4 I. C. C., 664; *Delaware State Grange vs. N. Y. P. & N. R. R. Co.*, I. C. C., 588; *In re Tank and Barrel Rates on Oil*, 2 I. C. C., 365.

Competition.—Actual competition of controlling force and as to traffic important in amount is to be considered amongst other circumstances.

In re L. & N. R. R., 1 I. C. C., 31; *King et al. vs. N. Y. H. & H. R. R. R. Co.*, 4 I. C. C., 251; *N. O. Cot. Ex. vs. Ill. Cen. R. R.*, 3 I. C. C, 534; *Lehmann et al. vs. Sou. Pac. R. R.*, 4 I. C. C., 1; *Bates vs. Penn. R. R.*, 3 I. C. C., 435; *Bates vs. Penn. R. R.*, 4 I. C. C., 281; *Bus. Men's Ass'n of Minn. vs. C., St. P., M & O. R'y Co.*, 2 I. C. C., 52; *N. O. Cot. Ex. vs. Ill. Cen. R. R. Co.*, 3 I. C. C., 534; *Rice vs. A. T. & St. F. R. R.*, 4 I. C. C., 228.

Dividends or profit.—The dividends or profit, while not conclusive, is to be considered amongst other things.

In re Food Products, 4 I. C. C., 65.

Storage capacity.—This is one of the elements to be taken into account.

Boston Cham. Com. vs. L. S. & M. S. R'y Co., 11 C. C., 436.

Distance or mileage.—This is also an element.

La Crosse Manu., etc., vs. C. M. & St. P. R'y Co., 1 I. C. C., 629.

Cost of production is a fact to be considered in the determination of what is reasonable.

Imperial Coal Co. vs. P. & L. E. R. R. Co., 2 I. C. C., 618; *In re Food Products*, 4 I. C. C., 48, 116; *Poughkeepsie Iron Co. vs. N. Y. Cen. & H. R. R. Co.*, 4 I. C. C., 195.

Mountains, grades, curves, snowdrifts, floods.—All these are factors that enter into the problem.

Evans vs. Union Pac. R'y et al., decided by commission February 8, 1896, in reference to rates on wheat.

This list could be extended, but it shows conclusively that the commission in dealing with this intricate subject in cases arising all over the country does so in a broad, liberal, and wise way and in full harmony with the de-

cisions of the courts, and its decisions are and have been as frequently in favor of the roads as against them.

The opinions of such a body are entitled to the greatest weight merely on the ground of its vast experience, if for no other reason.

The defendants only had to advance and prove any of these innumerable elements, and they would have been considered and given their proper value.

In the present case all the circumstances set up by the roads have been duly considered. They have been "weighed in the balance and found wanting."

If there are others, would the ingenious counsel have omitted to bring them out? His consummate skill, care, and industry precludes such a supposition.

He relies chiefly on competition, which after all is only one of many elements, and in this case he has failed utterly to establish "competition that affects rates."

COMMISSION FOUND RATE UNREASONABLE.

My friend says the commission failed to find whether or not the rate of 28 cents to Summerville was reasonable or unreasonable.

We think our friend is in error, for by deciding that the present rates violate the statute the commission has thereby held the rate unreasonable. In the language of the Supreme Court:

"The only material thing is to adjudge what is due according to the rule prescribed by the statute. That the Court of Claims has done. In doing so, it has virtually decided the point in issue; for, if the company has charged rates producing a different amount, they are thereby declared not to be fair and reasonable, because, whatever differs from the amount found by the court to answer this description, cannot be supposed to fulfill it" (*U. P. R'y Co. vs. U. S.*, 117 U. S., 359).

THE DISSENTING OPINION.

Judge Morris says there is abundant evidence "to show "the great loss which would result to the South Carolina & "Georgia railroad (the successor of the South Carolina rail-"road), if it was required to conform its *local* rates to its share "of the through rates" (Trans., p. 136. Italics mine).

The learned judge has fallen into the error of supposing that the haul from Memphis to Summerville, through the States of Tennessee, Mississippi, Alabama, Georgia, and South Carolina, is a local haul.

It must not be forgotten that neither the commission nor appellee nor any one else in this case is dealing with the local traffic of any road. We are dealing with interstate traffic only.

This error of Judge Morris is also the chief error that led the learned Circuit Court astray in following Judge Newman in the Social Circle case. This court directly overruled Judge Newman on this point.

In the Social Circle case, p. 398, I. C. R., and 162 U. S., p. 191, Justice Shiras said:

"Upon this part of the case the conclusion of the Circuit "Court was that the traffic from Cincinnati to Social Circle, "in issue as to the Georgia Railroad Company was *local*, "and that that company was not, on the facts presented, "made a party to a joint or common arrangement such as "make the traffic to Social Circle subject to the control of "the Interstate Commerce Commission. We are unable to "accept this conclusion." (Italics mine).

Furthermore, the calculations made in this case are based upon that erroneous idea, and are, therefore, inapplicable, being directed toward a theory solely. They are also insufficient to prove anything at all, for the only evidence of this possible $206,584.68 loss to the South Carolina's road is a table (at p. 106, Trans.), where the operating expenses are lumped at $1,049,535.50.

The language of Mr. Justice Brewer (in Chicago, &c., Railway Co. *vs.* Wellman, 143 U. S., 345) is particularly applicable here.

He says:

"It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partly of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the court, it has not come to this, that the legislative powers rest subservient to the discretion of any railroad corporation which may, by

exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'

"We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

This language is cited with approval in St. L. & S. F. R. R. *vs.* Gill, 156 U. S., pp. 660 and 661.

So we say here the record is silent as to many material facts in regard to this alleged future annual deficit.

Among other things, suppose it should appear that at the time this report was made, June 30, 1892, the road had a bonded debt of over $12,000,000, and that it was afterwards sold for $1,000,000 at auction (Trans, 123.) At five per cent. this would only make an interest account of $50,000 annually, and, instead of having to pay interest on funded debt, $374,434.60, as the report has it (Rec., p. 105), there would be a saving in this item alone of $324,434.60 annually, which would completely annihilate the imaginary loss of $206,584.68 and make a handsome surplus, over $70,000 annually.

In Dow *vs.* Beidelman, 125 U. S., 680, Mr. Justice Gray says:

"But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the company as reorganized or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under foreclosure equalled the original cost of the road, or the amount of outstanding bonded debt."

But it is idle to pursue these imaginary losses, for, as the Supreme Court has said, the evidence is wholly insufficient, and moreover, as we have seen, they are based upon the imaginary notion that an effort is being made to interfere with local rates, which is not at all the case, as no such issues are made.

Besides, as the Supreme Court remarks, all experience shows "that a reduction of rates will increase the amount of the business, and therefore the earnings" (143 U. S., 343).

And further, as the English cases say, "the affluence or indigence" of the parties is beside the subject. (See also Turnpike Co. *vs.* Sanford, 164 U. S., 578.)

HOW RATES ARE MADE.

In the recent case of *Chicago, M. & St. P. R'y Co. vs. Tompkins*, 90 F. R., 368, the circuit court for South Dakota says: "* * * Nor in the face of the record, can the complainant claim that it ever adopted a schedule of rates and "fares upon its lines within the State of South Dakota which "was based upon the value of the services rendered. Mr. "Bird, general traffic manager of the complainant, a witness for the complainant, when upon the stand, testified as "follows: 'I testified this morning that I had been in the "'service somewhat over thirty years, and had been en"'gaged in making rates during that time, and I never "'have yet had an opportunity of making a tariff on a basis "'of what the service was worth. I have never had the "'opportunity to determine the rate by the value of the "'services. The rates are made what they must be.'"

Mr. Stickney says:

"The interstate law recognizes the necessities of the case, "but instead of making schedules or appointing commissions to make them, it contented itself with impotently "enacting, in general and somewhat ambiguous terms that "somebody else should make them, namely, the railway "officials, *who unfortunately know no more about it*, and wholly "lack the necessary power to enforce the schedules when "made" (Railway Problem, p. 142. Italics mine).

"They have succeeded in surrounding rate-making with "*so many apparent difficulties and mysteries that they have "completely overwhelmed the judgment of the ablest men*" (*id.*, 143).

In witness of the truth of this we see Judge Severens apologizing and expressing an opinion with "diffidence" upon a subject which, as Mr. Stickney, an expert and leading light in railroad circles himself, says, the railroad officials unfortunately know no more about than anybody else.

Mr. Stickney goes on to say, at page 148 of his book:

"A large part of the army of chief and subordinate em"ployés about the general traffic offices are not engaged in "making schedules of reasonable public rates, but, on the "contrary, in devising means to secretly avoid such rates, "so as to 'scoop the business' as against competitive lines, "and the conflicting interests which they are adjusting grow "out of the unjust discrimination they are practicing. De"stroy their power to discriminate and there would be few "conflicting interests to adjust, and little other occupation "for the traffic department as now organized.

"Who possesses the exact knowledge of such details as

"would be pertinent to the construction of a schedule of "rates in conformity to the principles of law? No schedule "of that kind has ever been constructed or attempted, and "it is probable that the exact knowledge of the details usu- "ally current in the general traffic offices of a railway com- "pany would not materially aid in the first attempt at mak- "ing such a schedule."

At page 86 he says:

"The truth is, and it is time the investing public should "be told the truth, it is not the so-called 'granger laws,' nor "the interstate law, nor the acts of commissions which have "reduced the rates of transportation to the present unprofit- "able level, but the *mismanagement of the companies.*" (Italics mine.)

It may be well to say that, as far as the case at bar is concerned, we do not think it necessary to contend that railways should not make their own rates. That question does not arise here. We only quote eminent and experienced railroad men to show how rates are made.

MATHEMATICS AND RATES.

It is true that Lord Herschell and Mr. Justice Wills in the Phipps case have said that mathematics should play no part in rate-making. Other tribunals have likewise held the same. We might use Mr. Baxter's argument as to Judge Severens on this point, namely, that, while he entertains the deepest respect for his judgment on questions of law, he cannot accept without question his opinions on intricate railway problems. This might be said of all courts; but we are not in this case advocating that rates should be constructed on a purely mathematical basis. Time may show that such is the correct method, and on the other hand it may not. Our present aim is merely to call this court's attention to the subject so that it may not decide the matter definitely one way or the other "without the fullest disclosure of all the material facts," to use the language of Mr. Justice Brewer in Chicago, &c., R'y Co. *vs.* Wellman, 143 U. S., 345, where he also says, "Our suggestion is only to indicate how easily "courts may be misled into doing grievous wrong to the "public." * * *

Rates have been in other countries constructed on this basis. In his work on "Inland Waterways," heretofore alluded to, Prof. Emory R. Johnson says, at page 79:

"No American engineers have made a detailed calculation "for the purpose of comparing how much railroad com- "panies and owners of private canals must charge per ton "per mile of freight in order to obtain a fair remuneration

" on invested capital. Work of this kind has been done by " the German engineers, Bellingrath and Symphner. They " figured out carefully the cost of transportation by large " canals and by rail, including every item, maintenance and " management of ways, and for maintenance of floating and " rolling stock, cost of hauling and profits of ship-owners, " but their calculations were confined to German roads and " canals, and were made ten years ago."

So we see that it is quite feasible; at all events it has been done.

Mr. Stickney, a practical and highly intelligent railroad man, advocates the idea. At page 64 of his work, The Railway Problem, he says:

" In every other business and in every department of the " railway business except the traffic department mathematics " plays a conspicuous part. The merchant and manufact- " urer calculate their profits by percentages on the cost price. " The engineer, in constructing a railway, recognizes the " fact that all curves are comprised of tangents, which bear " fixed mathematical relations to each other, which must be " observed, and that his gradients must be carefully and " mathematically worked out and measured. The superin- " tendent, in making out a time-card for running his trains, " recognizes the necessity of mathematical accuracy, for the " question as to where and when two trains shall meet can- " not be guessed at or left to chance, but in the traffic de- " partment it is different. The average traffic officials may " truthfully be said to detest mathematics as ' the devil does " ' holy water.' They boldly say that it is impossible to " make a tariff of rates based on strict mathematical princi- " ples, like a time-card for running trains. This prevailing " idea is probably based upon the fact that with their limited " mathematical knowledge they are aware of no method of " reaching similar results without such infinite labor as " staggers the human mind to contemplate, or possibly upon " the further fact that, as the business is now conducted, " such schedules would evidently be useless."

At page 68 he says:

" The treatment of rates separately and as bearing no " mathematical relation to each other, necessarily makes the " detail labor of the traffic department so prodigious that " it is altogether beyond the physical ability of any one " man. In working out the printed rates alone, the mass of " figures is so voluminous that no human intellect can " grasp them. To illustrate this point, it may be stated that " the number of separate printed tariffs in legal effect on a " large system at any given time may be approximately esti- " mated at three thousand, some of them containing thirty

"or forty large-size pages of solid columns of closely printed "figures. It goes without saying that under such circum- "stances this work must be left to subordinates and clerks "and while they are all issued under the signature of the "chief, as a matter of fact he has examined but few of them, "and such examination as he is able to make is of a most "cursory character. Taking all these facts into considera- "tion and remembering the further practice which has come "into vogue of meeting 'not only the cut rates that have "'been made, but also those that it is thought probable or "'possible will be made by rival companies,' and of doing "this quickly on the spot, it will not be difficult to under- "stand how large a number of persons must be entrusted "with the high prerogative of making rates, as well as how "the chaotic condition of the tariffs comes about."

In the case at bar we have not gone into mathematics, but have confined our attention to a few figures and facts put forward, not by us, but by the railroads themselves, and consequently they are not to be discarded or discredited out of their mouths at least.

We have used the rate per ton per mile given us by the roads themselves as the cost of carriage, and from that have estimated profit.

In Smythe *vs.* Ames this court took into consideration the *cost per ton per mile.* (See p. 529, 169 U. S.; see also Northern Pac. R'y Co. *vs.* Keyes, 91 F. R., 51.)

This concludes the point of reasonableness. We will now take up discrimination.

UNDUE DISCRIMINATION.

Undue discrimination may be defined as demanding and collecting from the residents of one locality materially higher rates than at the same time are charged the residents of another locality for substantially the same service.

The Circuit Court of Appeals and the commission having both found in the case at bar that the circumstances and conditions are, as a matter of fact, substantially similar, and this finding being amply sustained by the evidence, as we have seen, it necessarily follows that as Summerville is subjected to a charge materially higher than Charleston, it is a locality unduly discriminated against, and that Charleston is unjustly preferred.

THE ORDER OF THE COMMISSION DOES NOT FIX RATES; HENCE BY AFFIRMING IT THE COURT HAS NOT IN EFFECT HELD THAT THIS POWER RESIDES IN THE COMMISSION.

We hold that the question of the commission's power to fix rates does not arise in the case at bar, and that the case of the Interstate Commerce Commission, appellant, *vs.* The Cincinnati, New Orleans & Texas Pacific R. R. Co. *et al.* (167 U. S., 479) has no bearing on the case at bar as far as that point is concerned.

By comparing the order of the commission as published in the decision of the Supreme Court in the above-mentioned "Cincinnati case," as it is known, with the order of the commission in the Behlmer case (pp. 23, 24, Trans.), it will be seen that they differ totally. In that case a schedule of rates was prescribed on many classes of freight to many cities, and above all the commission went to the extreme of forbidding any greater charge "than is below specified in cents per hundred pounds," thus fixing absolutely to a cent the rates as set out in the schedule. The above quotation is from the order as published in the opinion of the Supreme Court. (See 167 U. S., 482.)

On the other hand, in the Behlmer case nothing of the sort was attempted. What the rates shall be is left wholly to the roads. They can fix them at any figure they see fit. The charges are not prescribed to a cent by the commission. No figures at all are indicated by the commission. The roads have the utmost freedom to act in determining what the rates shall be.

No tariff has been established by the commission in Behlmer's case, and that is what Mr. Justice Brewer in his opinion declares to be unlawful. He says: "These considerations "convince us that under the interstate commerce act the "commission has no power to prescribe the tariff of rates "which shall control in the future, and therefore can-"not invoke a judgment in mandamus from the courts to "enforce any such tariff by it prescribed." (See page 506, 167 U. S.)

Now, in Behlmer's case, the commission has simply done what the Supreme Court in this very decision says it has a right to do, namely, prohibited a violation of the fourth section of the act.

At the same page, 506, above mentioned, Mr. Justice Brewer goes on to say:

"But has the commission no function to perform in re-"spect to the matter of rates; no power to make any inquiry "in respect thereto? Unquestionably it has, and most im-

" portant duties in respect to this matter. It is charged with " the general duty of inquiring as to the management of the " business of railroad companies, and to keep itself informed " as to the manner in which the same is conducted, and has " the right to compel complete and full information as to " the manner in which such carriers are transacting their " business. And with this knowledge it is charged with the " duty of seeing that there is no violation of the long and " short haul clause;" &c.

So in Behlmer's case the roads are left free to prescribe what rates they please, but they are forbidden to violate the long and short haul clause by making a greater charge to Summerville than to Charleston.

This is the express duty of the commission under direct authority of the "Cincinnati case," as decided by the Supreme Court.

The order in the Behlmer case is precisely the same as was the order in the celebrated Social Circle case after it was modified by the Circuit Court of Appeals, and the Supreme Court sustained that portion of the commission's order, and the Social Circle case has not been overruled or modified. It will be remembered that in the Social Circle case the Circuit Court of Appeals for the Fifth Circuit struck out that portion of the commission's order requiring the roads to cease and desist from making any charge for the transportation of such freight as was in question from Cincinnati to Atlanta in excess of $1 per 100 pounds, but that portion of the commission's order requiring defendants to cease and desist from making any greater charge in the aggregate on buggies, carriages, and other freight of the first class from Cincinnati to Social Circle than they charged on such freight from Cincinnati to Augusta was allowed to stand and was finally affirmed by the Supreme Court. (See 162 U. S., 184.)

THE S. C. AND G. R. R. CO. BOUND BY THESE PROCEEDINGS. SERVICE OF COMMISSION'S ORDER ADMITTED IN THEIR ANSWER.

At pages 128, 129, Trans., and *42 U. S. App., 581*, the Circuit Court of Appeals says:

"At the time of the institution of the proceedings before " the Interstate Commerce Commission the South Carolina " Railway Co. was represented by Daniel H. Chamberlain, " its receiver, who was made a defendant, and who filed his " answer to the petition. The proceedings were instituted " in December, 1892, and the order of the commission issued

"on the 27th day of June, 1894, but prior thereto, on April "12, 1894, the South Carolina Railway Co. was sold by "virtue of a decree of the Circuit Court of the United States "for the district of South Carolina, entered in the cause of "*Bound vs. South Carolina Railway Co. et al.*, in which said "cause the said Daniel H. Chamberlain had been appointed "such receiver. On the 12th day of May, 1894, the pur- "chaser of said property under said foreclosure sale conveyed "the same to The South Carolina & Georgia R. R. Co., a "defendant herein. That company moved the court below "to dismiss these proceedings, so far as it was concerned, for "the reason that there was no evidence before the court of "any notice to, or service of the same upon said company, of "the institution of this action before the Interstate Commerce "Commission, nor any evidence of any refusal or neglect by "it to obey the order of the commission. The court below "was of opinion that there was no evidence of the service of "the commission's order on the South Carolina & Georgia "Railway Co., nor of its refusal or neglect to obey the same, "but as there were other defendants as to whom it was nec- "essary to dispose of the questions raised, the court pro- "ceeded to a decree concerning the same.

"The petition filed in the court below avers that the "findings and conclusions of the commission in the matter "of the petition filed before it by the appellant, together "with a copy of the order and notice, were delivered to each "and all of the parties to the cause, their receivers and suc- "cessors in operation. We think the evidence sufficiently "sustains these allegations. The South Carolina Railway "Co. had due notice of the proceedings before the commis- "sion, and filed its answer through its receiver, and it "plainly appears that a registered letter was sent from the "office of the secretary of the commission in July, 1894, "and duly delivered at Charleston to the successor of said "South Carolina Railway Co.—the South Carolina & Georgia "R. R. Co.—which contained a copy of the opinion and "order of the Interstate Commerce Commission made and "filed in the matter of said petition. That such copy was "received by the South Carolina & Georgia R. R. Co. is not "doubted, and the point relied upon by that company in its "motion to dismiss made in the court below was that the "name of the South Carolina & Georgia R. R. Co. is not "mentioned in said order and opinion, and the further fact "that said company was organized after the date when such "order and opinion were made and filed. In our judgment "this position of the South Carolina & Georgia R. R. Co. is "without merit. So far as the questions involved in this "controversy are concerned, we think it had sufficient notice,

"and in fact that it was bound by the notice served upon "and the answer filed by the receiver of the South Carolina "Railway Co. The petitioner in his complaint filed with "the commission charged the South Carolina Railway Co. "and its receiver with unlawfully charging an unreasonable "rate of freight on certain articles transported over its line "and other lines with which it had traffic arrangements, and "the commission, after full investigation, found that the "petitioner's allegation was true, and ordered that said road "and the others connected with it cease, on or before July 15, "1894, to make such unlawful charges. We are utterly un-"able to agree with the contention that such order of the "commission was rendered absolutely nugatory, within a "few days after it was issued, by the mere fact that the "name of one of the railroads mentioned therein had in the "meantime been changed, while the traffic arrangements "theretofore in existence were still in force. To so hold "would render it impossible for any petitioner to obtain re-"lief in cases similar to this, and would in fact prevent the "commission from enforcing its lawful orders. The Su-"preme Court of the United States in the case of *United "States vs. Trans-Missouri Freight Association*, 166 U. S., 290, "309, in effect decides this point in the manner we have "indicated when it says in substance that if by the mere "dissolution of the association originally proceeded against "the suit abates, that then defendants have thereby discov-"ered an effectual means to prevent the judgment of the "court being given on the question really involved in the "case.

"We do not think it essential to the decision of this case "to further consider the argument of counsel relating to "the pecuniary liability of the purchaser or property sold "under foreclosure decree, nor of the responsibility of such "purchaser for contracts made by the receiver prior to such "sale, as, in our judgment, the propositions of law therein "involved are not applicable to the facts and circumstances "of this case. We conclude that the court below had juris-"diction of the parties and of the subject-matter involved, "and such being the case, it was its duty as a court of equity "to make both its jurisdiction and its remedy effectual for "perfect relief, if it found the allegations of the petition to "be true."

It would seem hardly necessary to argue this question, in view of the foregoing extract from the opinion of the Circuit Court of Appeals.

It is to be borne in mind also that one of the assignments of error on behalf of Behlmer to the decree of the Circuit Court was that said Circuit Court erred in requiring evi-

dence to be put in before it to establish admitted facts, to wit, the service and disobedience of the commission's order (Trans., pp. 115, 116).

By the decree of reversal this assignment of error was sustained.

An examination of the record will show that service of the order is admitted.

Section 8 of the bill alleges:

"That thereafterwards the said commission did, as re-"quired by law, cause a properly authenticated copy of its "said report of findings of fact and conclusions in said cause, "together with a copy of the order and notice aforesaid, to "be delivered to each and all of the parties to said cause, "their receivers and successors in operation" (Trans., p. 4).

In paragraph 1 of the joint and several answer of the L. & N. R. R. *et al.* it is admitted "that respondent D. H. "Chamberlain is now, and for more than six months last "past has been, the receiver of the railroad of the said South "Carolina Railway Company" (Trans., p. 28).

In the same answer we find the following:

SEC. 8. "Respondents admit that afterwards, the said "commission did cause a properly authenticated copy of "said report of so called findings of fact and conclusions in "said matters, together with a copy of said order and notice, "to be delivered to each and all of the parties to the said "petition, filed before said commission, their receivers and "successors in operation" (Trans. p. 31).

SEC. 9. "Respondents admit that after said report and so-"called findings of fact and conclusions of said commission "were filed, and its said order was made and entered as "aforesaid and on and prior and after the days that said re-"port and said order and notice were delivered to the par-"ties to the petition before the commission, the defendants "to said petition, their receivers and their successors, did "have, publish, keep in effect, and charge certain rates for "the transportation of the kinds and classes of freight "mentioned in said report and order, which charges were "and are the same complained of in said petition filed be-"fore said commission, to wit, 28 cents per hundred pounds "on hay from Memphis, Tennessee, to Summerville, South "Carolina" (Trans., p. 32).

In the separate answer of the S. C. & G. R. R. Co. we find the following:

SEC. 2. "This respondent denies that it has heretofore "been impleaded either by itself or with other common car-"riers before the Interstate Commerce Commission as alleged "in said petition, and this respondent further says that at "the time when said original petition was filed by H. W.

" Behlmer before the Interstate Commerce Commission, and " at the time the proof was taken thereon, and at the time " when the issues made under said petition were heard, this " respondent was not in existence, and this respondent sub- " mits that the proceedings had upon said original petition " and the findings and orders made thereupon by said com- " mission do not bind nor affect this respondent in any way " whatsoever, it was not before said commission in any way " or for any purpose whatever.

" That the railway and property of the South Carolina " Railway Company under the order and decree of this " court were sold on the 12th day of April, 1894, to Gustav " E. Kissel and others, and the sale thereof having been " confirmed by this court on the 24th day of April, in said " year, a conveyance of the said railway and the property " of said company was made to said Gustav E. Kissel and " others on the first day of May, in said year, by the special " master of this court, and said Kissel and others on the 12th " day of May, in said year, conveyed the same to this re- " spondent, and this respondent denies that any order and " notice from the said Interstate Commerce Commission " directing this respondent to do or abstain from doing any- " thing whatever has ever been served upon this respondent.

" And this respondent is not bound by any of the proceed- " ings referred to in the petition herein as having taken " place before said Interstate Commerce Commission.

" 3. This respondent, although it is advised that it is not " bound to make further answer to the petition in this cause, " yet further submits that it is informed and believes that " the joint and several answer filed by its codefendant, The " Louisville & Nashville Railroad Company, and others, " truly and correctly states the facts relating to the proceed- " ings had upon said original petition filed by the said peti- " tioner before said Interstate Commerce Commission, and " also the facts relating and pertaining to the matters and " things alleged and averred in said original petition, and " therefore this respondent, if required to make further an- " swer to the statements contained in the present petition, " relies upon the facts and statements contained in the afore- " said answer of its said co-respondent as fully as if the same " were repeated and set out herein " (Trans., p. 44).

1. It will be observed that the bill alleges that a copy of the order, report, and findings of the commission in the Behlmer case was delivered to the " parties to said cause, " their receivers and *successors in operation.*"

The joint and several answer adopted and relied on by the S. C. & G. R. R. " as fully as if the same were repeated " and set out herein " admits that " the said commission did

"cause a properly authenticated copy of its report of so-"called findings of fact and conclusions in said matters, "together with a copy of said order and notice, to be deliv-"ered to each and all of the parties to said petition filed "before said commission, their receivers and *successors in* "*operation.*"

This is surely an admission on the part of the S. C. & G. R. R. Co. that it got the order.

2. But aside from this, service is admitted, for the allegation of the bill, being distinct and definite as to the delivery of this particular order, the evasive phraseology of the separate answer denying "that any order or notice from the "said Interstate Commerce Commission *directing* this re-"spondent to do or abstain from doing anything whatever "has ever been served upon this respondent," is a clear admission that the order was received by this road. It does not deny that some order was served nor that the particular order mentioned was served. It merely denies evasively "that any order and notice from said Interstate Commerce "Commission *directing* this respondent," &c., was received, the point being that because the order mentioned the receiver by name and did not mention his successor, the South Carolina and Georgia railroad, by name they got no order directing them to do anything.

This, however, is an admission of the particular allegation of the bill. Where the defendant "answers evasively, the "allegations will be taken as admitted."

3 *Greenleaf on Ev.*, § 276.
Jones vs. Person, 2 *Hawks*, 269.
Salla vs. Duncan, 7 *Monroe*, 382.
McCampbell vs. Gill, 4 *J. J. Marsh*, 871.

3. There is also evidence that the receiver turned over to the S. C. & G. R. R. "all claims against the receiver and all "obligations incurred by him," and that these were "assumed" by said S. C. & G. R. R. (Trans., p. 123).

There is no dispute that the receiver got the order, and as by it he "incurred an obligation" he must have turned the order over, as is stated.

It is unquestionable, then, that the Circuit Court of Appeals is correct in finding that "the evidence sufficiently sustains these allegations" of delivery of the order.

The only real question was as to the binding force of the order as a matter of law. The Circuit Court of Appeals has followed the decision of this court in the Trans-Missouri case on that point, and it is settled.

The same question was passed upon and all the cases re-

viewed in I. C. C. *vs.* W. N. Y. & Penn. R. R., 82 F. R., 192. The court there said :

"The question is, are these succeeding companies to be "regarded as strangers to the order? We cannot think so. "It would indeed be lamentable if a lawful order against "unjust discrimination by a railroad company, made by the "Interstate Commerce Commission after a protracted inves- "tigation, could be nullified by the subsequent reorgani- "zation of the company, or transfer of its railroad and "franchises to another corporation. It is a settled principle "that the purchaser of property in litigation, *pendente lite*, is "bound by the judgment or decree in the suit (1 Story, Eq. "Jur., § 405). And the rule is said to be founded upon great "public policy, for otherwise alienations made during a suit "might defeat its whole purpose, and there would be no "end to litigation (*id.*, § 406). This principle is applicable "here. This case is very different from those of Sullivan "*vs.* Railroad Co., 94 U. S., 806, and Hoard *vs.* Railway Co., "123 U. S., 222, wherein it was attempted to enforce against "a succeeding owner a contractual liability which did not "run with the property, but simply bound the former owner "personally. Here the new railroad companies have suc- "ceeded to the enjoyment of public franchises, and they "have voluntarily taken upon themselves the performance "of reciprocal public duties. This proceeding is for the "enforcement of a public duty which is inseparable from "the ownership of the railroad. No injustice is done to "these new companies by joining them as defendants here, "for they are entitled to be heard against the enforcement "of the order of the commission, and the court is to pro- "ceed and determine 'in such manner as to do justice in "'the premises.'"

A purchaser *pendente lite* is as conclusively bound by the results of the litigation as if he had from the outset been a party thereto.

Tilton *vs.* Colfield, 93 U. S., 106.
Mellen *vs.* Moline Iron Works, 130 U. S., 371.

As said by Sir William Grant in Bishop of Winchester *vs.* Paine, 11 Ves., 194, 197: "The litigating parties are ex- "empted from the necessity of taking any notice of a title "so acquired. As to them, it is as if no such title existed. "Otherwise such suits would be indeterminable, or which "would be the same in effect, it would be in the pleasure of "one party at what period the suit should be determined."

The decree of sale expressly made it a condition and a part of the consideration that the purchaser, "he or they, or their "assigns, will pay, *satisfy*, and *discharge*," * * * "all ob-

"ligations contracted and *all obligations incurred* by the re-"ceiver," and further gives the right to enter appearance in court and contest "any claim or demand which may be presented at any time" (Trans., p. 121).

Appellant contends that the terms of the decree refer only to pecuniary obligations, and do not extend to other obligations of the receiver, as appellee insists. Even under this narrow construction they are bound, for the nature of the present demand is pecuniary—it means a saving of $18 per car-load to appellee. In U. S. *vs.* Miss. Pac. R. R., 65 F. R., 906, the court says:

"The bill further sets out, in detail, that about 100 per "cent. greater rates are charged to Wichita than to Omaha "on the same kind and classification of freights, and this "while the shipments are made, as alleged, contemporane-"ously under similar circumstances and conditions. It is "further alleged that such rates are unreasonable, excessive "and exorbitant. * * *

"The abuse charged in the bill affects the public, and is "*pecuniary* in its nature."

Appellants say a *lis pendens* only binds an interest.

What interest passed under the decree? The franchises were sold.

"The franchises of a corporation are the rights or privileges, which are essential to the operation of the corporation, and, without which its roads and works would be of little value, such as the franchise to run cars, *to take tolls*, to appropriate earth and gravel for its road, or water for its engines, and the like."

C. & O. R'y vs. Miller, 114 U. S., 186, citing *Morgan vs. La.*, 93 U. S., 217.

So, meeting my friend on his own ground, the doctrine of *lis pendens* binds the interest *to take tolls* that passed by the sale.

In the case of *Hoard vs. C. & O. R'y Co.*, 123 U. S., p. 226, relied on by appellant, a clear distinction is drawn between *payment* of debts and *performance of obligations*, and, in this respect, is an authority for us. It was a suit for specific performance, and the court dismissed the bill because "the present defendant, the *railway* company, is not shown to be under any obligation to perform the covenant of its predecessor, the railroad company, which is set up here as a matter of specific performance" (123 U. S., 226).

If they had purchased under a decree such as in the case at bar, expressly making it a condition and a part of the consideration of purchase that the purchaser, "he or they, or their assigns, will *pay, satisfy* and *discharge*" * * *

"all obligations contracted and *all obligations incurred* by the receiver," the result would have been different and the bill unquestionably retained.

Appellant's other case, *R. R. Co. vs. Miller*, 114 U. S., 176, merely decides a well-settled doctrine that an exemption from taxation is a personal privilege that does not go to a new corporation taking the property of a predecessor unless there is some express provision of law transmitting the privilege. There are later cases decided by the Supreme Court, in fact, one very recently, announcing this well-established doctrine.

We fail to perceive the applicability of this case. We are not asserting that the S. C. & G. R. R. is exempt from taxes.

Even after the receiver has been discharged an action may be maintained against a railroad for injuries sustained during the receivership (Tex. & Pac. R. R. *vs.* Johnson, 151 U. S., 81).

Lastly, this may be regarded as a bill to restrain an unreasonable rate, and appellant is certainly before the court, having been duly subpœnaed.

Reagan vs. Trust Co., 154 U. S., 362.
R. R. Co. vs. Gill, 156 U. S., 649.
Smythe vs. Ames, 169 U. S., 466.
U. S. vs. Miss. Pac. R. R. Co., 65 F. R., 906.

THE CONSTITUTIONALITY OF THE COMMERCE ACT AS TO FEES.

Appellants seek to have the commerce act declared unconstitutional. This is an "enterprise of great pith and "moment," which we venture to suggest proceeds upon a misconception of the case of *Gulf, Colorado & Santa Fé R'y vs. Ellis*, 165 U. S., 150. That case distinctly upholds the imposition of an attorney's fee or double damages, &c., as a penalty for the infraction of a duty imposed by a statute passed in valid exercise of the police power.

In pronouncing the opinion of the court, Mr. Justice Brewer, at pages 157, 158, 165 U. S., says:

"That such corporations may be classified for some pur-
"poses is unquestioned. The business in which they are
"engaged is of a peculiarly dangerous nature, and the legis-
"lature, in the exercise of its police powers, may justly
"require many things to be done by them in order to secure
"life and property. Fencing of railroad tracks, use of
"safety couplers, and a multitude of other things easily
"suggest themselves. And any classification for the impo-
"sition of such special duties—duties arising out of

"the peculiar business in which they are engaged—is "a just classification, and not one within the prohibition of "the fourteenth amendment. Thus it is frequently required "that they fence their tracks, and as a penalty for a failure "to fence double damages in the case of loss are inflicted "(*Missouri Pacific Railway vs. Humes*, 115 U. S., 512). But "this and all kindred cases proceed upon the theory of a "special duty resting upon railroad corporations by reason "of the business in which they are engaged—a duty not "resting upon others; a duty which can be enforced by the "legislature in any proper manner; and whether it enforces "it by penalties in the way of fines coming to the State, or "by double damages to a party injured, is immaterial. It "is all done in the exercise of the police power of the State "and with a view to enforce just and reasonable police "regulations."

In reviewing the cases Mr. Justice Brewer, at page 163, says:

"It is worthy of note that in the same volume is found a "decision by the same court, sustaining a statute allowing "an attorney's fee in actions for the recovery of overcharges "by railroads (*Dow vs. Beidelman*, 49 Arkansas, 455); but "the statute had prescribed the rates of charge for the car- "riage of passengers by railroads, had forbidden an over- "charge, and it was a penalty for failure to comply with "such police regulations that the allowance of an attorney's "fee was sustained."

It is clearly laid down then by this court that a penalty may be imposed "with a view to enforce just and reason- "able police regulations," under which head comes a law regulating rates, and this court cites with approval the Arkansas case sustaining a fee as a penalty, and distinguishes it in principle from obnoxious cases, such as the one then before the court where "the statute arbitrarily singles out "one class of debtors and punishes it for a failure to per- "form certain duties—duties which are equally obligatory "upon all debtors; a punishment not visited by reason of "the failure to *comply with any proper police regulations*, or "for the protection of the laboring classes or to prevent liti- "gation about trifling matters, or in consequence of any "special corporate privileges bestowed by the State" (165 "U. S., p. 159. Italics mine).

This case of Dow *vs.* Beidelman, 49 Ark., 455, thus cited with approval by the court in 165 U. S., 163, was directly passed on by this court on an appeal from the supreme court of Arkansas, and the judgment of that court was affirmed. (See *Dow vs. Beidelman*, 125 U. S., 680.)

At pages 684, 685, 125 U. S., we find:

"The defendants asked the court (an inferior court of "Arkansas) to make the following declaration of law:

"First. The act of the General Assembly of the State of "Arkansas, approved April 4, 1887, in so far as it relates to "the present proceeding, is unconstitutional, null and void, "because, under the guise of regulating charges for the car- "riage of passengers on railroads, it amounts virtually to "the confiscation of the property of the railroads in the "hands of said defendants, and is an unreasonable, unjust, "and oppressive taking of private property for public uses "without compensation in violation of the constitution of "the State of Arkansas and that of the United States.

"Second. The said act of the General Assembly is uncon- "stitutional, because it is special legislation and makes arbi- "trary discriminations between the different railroads, not "based upon their value, their earnings, or other valid "grounds, but based simply on the respective lengths of the "several railroads.

"The court refused to make either of these declarations of "law, and gave judgment for the plaintiff for a penalty of "fifty dollars *and a counsel fee of twenty-five dollars*. The de- "fendants excepted to the refusal, and appealed to the su- "preme court of the State which affirmed the judgment.

"The defendants sued out this writ of error, and assigned "for error that the court erred in holding that the statute "of Arkansas of April 4, 1887, was not repugnant to the "clause of the fourteenth amendment to the Constitution of "the United States which provides that no State shall de- "prive any person of life, liberty or property, without due "process of law; and in holding that that statute was not "repugnant to the clause of the amendment which declares "that no State shall deny to any person within its jurisdic- "tion the equal protection of the laws." (Italics mine.)

It is thus clear that this very question was raised, and this court passed upon it and affirmed the judgment of the supreme court of Arkansas.

It was held in Dow *vs.* Beidelman, 125 U. S., 686, that the legislature in the exercise of its police power had the right to regulate fares and freights and to classify the railroads according "to the amount of business which they have done "or appear likely to do. Whether the classification shall be "according to the amount of passengers and freight carried, "or of gross or net earnings, during a previous year, or "according to the simpler and more constant test of the "length of the line of the railroad, is a matter within the "discretion of the legislature" (125 U. S., 691). In an- nouncing the opinion of the court, Mr. Justice Gray based

the decision on the following cases: *Munn vs. Illinois*, 94 U. S., 113; *Chicago, Burlington & Quincy R. R. vs. Iowa*, 94 U. S., 155; *Peik vs. Chicago & Northwestern R'y*, 94 U. S., 164, 178; *Chicago, Milwaukee & St. Paul R. R. vs. Ackley*, 94 U. S., 179; *Winona & St. Peter R. R. vs. Blake*, 94 U. S., 180; *Stone vs. Wisconsin*, 94 U. S., 181; *Ruggles vs. Illinois*, 108 U. S., 526; *Illinois Central R. R. vs. Illinois*, 108 U. S., 541; *Stone vs. Farmers' Loan & Trust Co.*, 116 U. S., 307; *Stone vs. Illinois Central Railroad*, 116 U. S., 347; *Stone vs. N. O. & Northeastern R. R.*, 116 U. S., 352; *Wabash & St. Louis & P. R'y vs. Illinois*, 118 U. S., 557; *Memphis & Little Rock R. R. vs. R. R. Comm.*, 112 U. S., 609.

In this case of Dow *vs.* Beidelman, 49 Ark., 455, the Supreme Court of Arkansas said:

Syllabus: "The act of April 4, 1887, to regulate the rates "of charges for the carriage of passengers by railroads, pro- "vides that for an overcharge beyond the maximum fixed "by the act, the company or person operating the road, "shall forfeit and pay not less than $50 nor more than "$300 and costs of suit, including a reasonable attorney's "fee. Held, That the attorney's fee is a part of the penalty "for the willful violation of the provisions of the act, and "stands upon the same footing as the money judgment to "be recovered, and including it as part of the penalty does "not make the act obnoxious to the objection of being "partial and unequal legislation."

After stating the act, as above set forth, the court adds:

"The attorney's fee is a part of the penalty imposed for "the willful violation of the provisions of the act, and stands "upon the same footing as the money judgment to be re- "covered. We have sustained the constitutionality of legis- "lation awarding double damages against a railway com- "pany for failure to give the prescribed notice of the killing "or injury of live stock by its train" (*L. R. & Ft. S. R'y Co. vs. Payne*, 33 Ark., 816).

"So in other States railroad corporations have been re- "quired by statute to fence their tracks and in case of "failure so to do, have been made liable for the damages, "and in some instances in double the amount of damages, "caused thereby and done by their cars and engines to cattle "and other animals on their roads. And such laws have "been held to fall within the police power of the State. "Here the damages are given by way of punishment to the "company for its negligence in failing to build the fence "(Thorpe *vs.* R. & B. R. Co., 27 Vt., 140; Mo. Pac. R'y Co. *vs.* "Humes, 115 U. S., 512; Johnson *vs.* Chicago & R. Co., 29 "Minn., 425).

"An attorney's fee may be included as a part of the penalty

"imposed for non-compliance with the duty imposed with-
"out rendering the statute obnoxious to the objection of
"being partial and unequal legislation (P. D. & E. R'y Co.
"*vs.* Duggan, 109 Ill., 537; K. P. R'y Co. *vs.* Yanz, 16 Kans.,
"583; Mo. Pac. R'y Co. *vs.* Abney, 30 *Id.*, 41).

"We have examined the cases of S. & N. R. Co. *vs.* Morris,
"65 Ala., 199, and Chicago R. Co. *vs.* Moss, 60 Miss., 646, but
"find the principles therein decided to have no application
"to a case like this."

This decision, as we have seen, was affirmed by this court in Dow *vs.* Bedelman, 125 U. S., 680, and is conclusive.

In the recent case of *Orient Insurance Co. vs. Daggs*, 172 U. S., 557, decided at this term, a Missouri statute putting fire insurance companies in a special class was affirmed, this court saying through Mr. Justice McKenna:

"It is not necessary to state the reasoning upon which
"classification by legislation is based or justified. This
"court has had many occasions to do so, and only lately re-
"viewed the subject in *Magoun vs. Illinois Trust and Savings*
"*Bank* (170 U. S., 283). We said in that case that 'the State
"'may distinguish, select and classify objects of legislation,
"'and necessarily the power must have a wide range of
"'discretion,' and this because of the function of legislation
"and the purposes to which it is addressed. Classification
"for such purposes is not invalid because not depending on
"scientific or marked differences in things or persons or in
"their relations. It suffices if it is practical, and is not re-
"viewable unless palpably arbitrary. The classification of
"the Missouri statute is certainly not arbitrary. We see
"many differences between fire insurance and other insur-
"ance, both to the insurer and the insured; differences in
"the elements insured against and the possible relation of
"the parties to them, producing consequences which may
"justify if not demand different legislative treatment. Of
"course it is not for us to debate the policy of any particular
"treatment, and the freedom of discretion which we have
"said the State has is exhibited by analogous if not exact
"examples to the Missouri statute in *Railway Company vs.*
"*Mackey* (127 U. S., 204) and in *Minneapolis Railway vs. Beck-*
"*with* (129 U. S., 26).

"In *Railway Company vs. Mackey* (127 U. S., 204) a law of
"Kansas was passed which abrogated as to railroads the
"rule of the common law exempting masters from liability
"to one servant for the negligence of another. It was sus-
"tained as a valid classification, notwithstanding that it did
"not apply to other carriers, or even to other corporations
"using steam. The law was objected to, as the statute of
"Missouri is objected to, on the ground that it violated the

"provisions of the constitution which we are now consider-
"ing.

"To the first contention the court, by Mr. Justice Field,
"said: 'The plain answer to this contention is that the lia-
"bility imposed by the law of 1874 arises only for injuries
"subsequently committed; it has no application to past in-
"juries, and it cannot be successfully contended that the
"State may not prescribe the liabilities under which corpo-
"rations created by its laws shall conduct their business in
"the future, where no limitation is placed upon its power
"in this respect by their charters. Legislation to this effect
"is found in the statute books of every State.' And, after
"further comment added: 'That its passage was within the
"competency of the legislature, we have no doubt.' To the
"second contention it was said: 'It seems to rest upon the
"theory that legislation which is special in its character is nec-
"essarily within the constitutional inhibition; but nothing
"can be farther from the fact.' The legislation was justified
"by the character of the business of railroad companies, and
"it was declared to be a matter of legislative discretion
"whether the same liability should or should not be applied
"to other carriers, or to persons and corporations using
"steam in manufactures.

"In *Minneapolis Railway Company vs. Beckwith*, (129 U. S.,
"26), a law of Iowa making a class of railroad corporations
"for special legislation was sustained."

We respectfully submit, therefore, that it is settled:

(1.) That the legislature may classify railroads and pass special laws to govern them.

(2.) That the regulation of fares and freights is a valid exercise of the police power.

(3.) That such regulations may be enforced by the imposition of "penalties in the way of fines coming to the State, "or by double damages to a party injured" (165 U. S., 158).

(4.) That an attorney's fee may be included in the penalty, for, as Mr. Justice Brewer says, approving the Arkansas case, "it was as a penalty for failure to comply with *such police* "*regulations* that the allowance of an attorney's fee was "sustained" (165 U. S., 163).

In view of all this the commerce act is not void on account of improper classification. It is a statute regulating fares and freights on interstate commerce, and is thus within the constitutional powers of Congress. It prescribes that rates shall be reasonable; that no charge shall be made for a longer than a shorter haul; that schedules of rates shall be published; it prohibits undue discrimination and so on.

For carrying out its provisions certain penalties are pre-

scribed, and this court has upheld their enforcement in some cases (*Wight vs. U. S.*, 167 U. S., 512).

This court has also held that certain provisions of the act were penal in their nature, and that the right given a shipper to recover the excess of a payment over and above the rates charged to shippers of similar goods to the same destination was penal in its nature (*Parsons vs. Chicago & Northwestern R'y Co.*, 167 U. S., 447).

When we examine the act, therefore, we find this provision for an attorney's fee in section 16 thereof (25 Stat. at Large, p. 855), and it is surrounded by clauses providing that in case the carriers shall disobey the courts, after they are commanded to conform to the law, the court may order them or any of them "to pay such sum of money not ex-"ceeding for each carrier or person in default the sum of "$500 for every day," &c. These are highly penal provisions, and, under the maxim *noscitur a sociis*, it is clear that an attorney's fee is also of this character.

It is only necessary to glance at this portion of section 16 to perceive that the provision for an attorney's fee is to be included as a part of the penalty for disobeying the law, and is therefore valid under the decisions hereinbefore cited. The act reads:

"And in case of any disobedience of any such writ of injunc-"tion or other proper process, mandatory or otherwise, it shall "be lawful for such courts to issue writs of attachment, or "any other process of said court incident or applicable to "writs of injunction or other proper process, mandatory or "otherwise, against such common carrier, and if a corpora-"tion, against one or more of the directors, officers, or "agents of the same, or against any owner, lessee, trustee, "receiver or other person failing to obey such writ of in-"junction, or other proper process, mandatory or otherwise, "and said court may, if it shall think fit, make an order di-"recting such common carrier or other person so disobeying "such writ of injunction or other proper process, mandatory "or otherwise, to pay such sum of money not exceeding for "each carrier or person in default the sum of five hundred "dollars for every day, after a day to be named in the order, "that such carrier or other person shall fail to obey such in-"junction or other proper process, mandatory or otherwise; "and such moneys shall be payable as the court shall di-"rect, either to the party complaining or into court, to abide "the ultimate decision of the court, or into the treasury, and "payment thereof may, without prejudice to any other mode "of recovering the same, be enforced by attachment or order "in the nature of a writ of execution, in like manner as if

" the same had been recovered by a final decree *in personam*
" in such court.

" When the subject in dispute shall be of the value of two
" thousand dollars or more, either party to such proceeding
" before said court may appeal to the Supreme Court of the
" United States, under the same regulations now provided
" by law in respect of security for such appeal; but such
" appeal shall not operate to stay or supersede the order of
" the court or the execution of any writ or process thereon,
" and such court may, in every such matter, order the pay-
" ment of such costs and counsel fees as shall be deemed
" reasonable " (25 Stat. at Large, p. 855).

Respectfully submitted.

CLAUDIAN B. NORTHROP,
Solicitor for Appellee.

SUPPLEMENT.

Appellee entertained the hope that appellants would adhere to the record in this court, but the hope seems vain.

It therefore becomes necessary, as it was before the Circuit Court of Appeals, to take up many matters not raised in the pleadings, not mentioned in the proof, not touched upon in the trial court, and not specified in the assignments of error before this court.

The Hay-Producing Territories and Census Figures.

1. These figures at pages 18 and 19 of my friend's brief only relate to hay. This case concerns hay and grain. An adroit attempt is made to diminish and keep out of sight the grain portion of this controversy. As we said before the commission, we only used a car-load of hay as an illustration of the rates on class D, including hay and grain.

All our testimony was directed to grain as well as hay, and we regard grain as equally, if not more, important than hay, as we wish to manufacture flour (Trans., p. 51).

My friend's figures, therefore, even if correct, relate only to competition of market with market in hay, and we would be entitled to a decree as to grain if no competition is proved in reference to grain, that "affects rates" on grain.

In the Reagan case the Supreme Court used this language in reference to certain statistics from the commissioner of agriculture of Texas (154 U. S., 408–409):

"None of the matters mentioned in the foregoing paragraph "appear in the pleadings, or elsewhere in the record, and it "is, therefore, doubtful to what extent they may be taken "into consideration. * * * While undoubtedly there "has been lately a period of financial depression, can we "take judicial notice of the extent to which that depression "has reduced the prices of the products of the State; and is "the report of the commissioner of agriculture of the State "to be considered as evidence before us, and accepted as sub-"stantially correct, both as to product and prices?"

We ask here, will this court take judicial notice of the census figures, and will they take judicial notice of the fact—if it be a fact—that all the hay raised in the Eastern States is consumed there, and that those States find it necessary to

draw on the West—from the Chicago territory—for an additional supply? Or will this court take judicial notice of the fact—if it be a fact—that the Eastern States raise a surplus supply of hay, and that this territory competes with the Chicago territory and the Memphis territory to furnish the needs of the South, the great consuming market for all these producing regions?

If the latter hypothesis be a fact, then, indeed, the South is very important—the great mine of wealth that supports the rest of the country. However, we think the other might turn out to be true, and on investigation it would be found that the East consumes all it raises and draws on the West for more; but none of this is in evidence, except the fact that the hay and grain which comes to Charleston is grown in the West, even that which comes via New York (Trans., p. 63).

Omission of New England, or Group I.

We have mentioned that Group I, or the New England States, has its food products from the West distributed at Boston rates (Trans., pp. 88 and 89). The able and ingenious counsel for defendants has omitted to compare Group I with Groups II and III, at pages 35 to 40 of his brief.

We now do this in Diagram "G."

It will be observed that Group I has just about the same appearance as Groups IV and V when compared with Groups II and III.

The territory between Chicago and New York comprises Groups II and III, and the New England States Group I.

Statistics of Railways (1894), frontispiece.

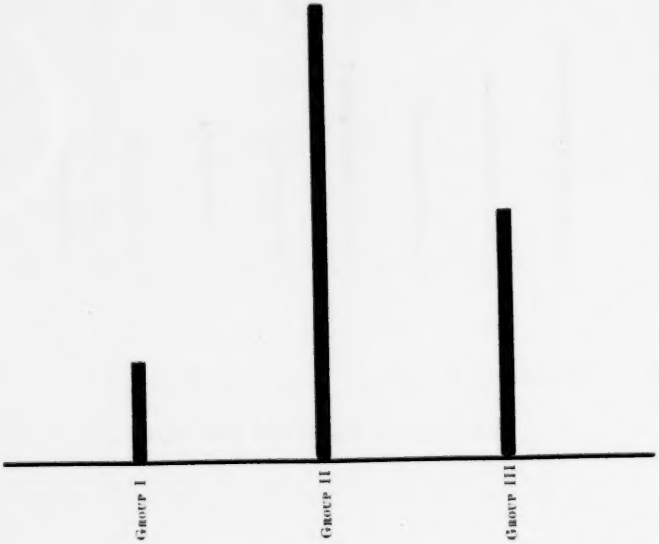
The statistician to the commission has published a number of diagrams to illustrate certain comparisons between the railroads in the various groups.

The following diagram (G) illustrates the difference between the railroads in Groups I, II, and III in their "earnings from freight service" during the year 1894.

Statistics of Railways (1894), App. Diagram No. 4.

DIAGRAM "G."

"Earnings from Freight Service."



The following diagram (H) illustrates the difference in "Density of freight traffic" between Group I, omitted by my friend, and all the other railroads in the United States, excepting Groups II and III.

Statistics of Railways (1894), App. Diagram No. 7.

It will be seen that our groups compare very favorably with the omitted groups.

DIAGRAM "H."

DENSITY OF FREIGHT TRAFFIC, 1894.

Statistics of Railways (1894), App. Diagram No. 7.

Capital and Earnings Compared.

While Groups II and III do a larger business, it must be remembered that their expenses are greater and they have to pay dividends on a greater capital.

Diagram "I" shows the comparison in the capital of Groups II, III, and IV.

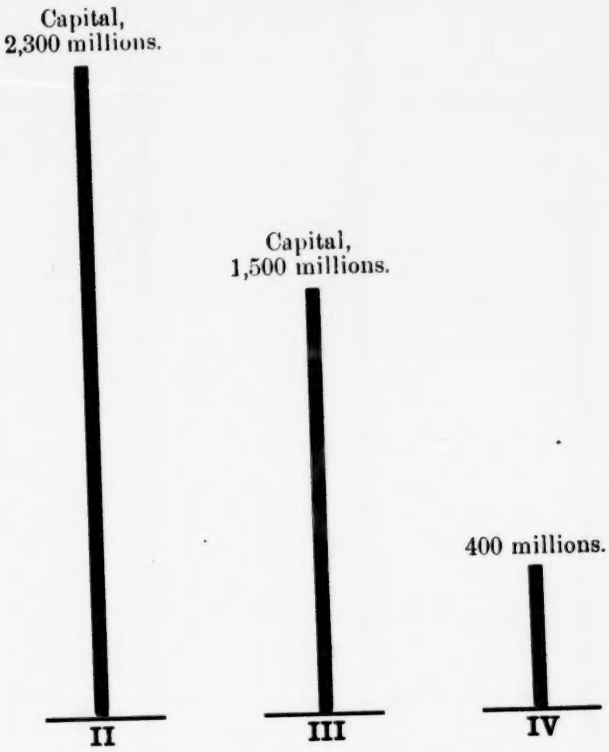
Diagram "J," page —, shows the earnings as compared with the capital of Groups IV and V, and the earnings as compared with the capital of all the railroads in the United States.

It will be observed that our groups compare very favorably with the rest of the country in proportionate earnings.

Some idea of the greater expense in Groups II and III may be formed when we consider that in 1894 Group II had 1,047 employés to every 100 miles of road; Group III, 518 employés to every 100 miles of road; whereas Group IV had only 360 employés to every 100 miles of road and Group V had only 316 employés to every 100 miles.

See Statistics of Railways (1894), p. 33.

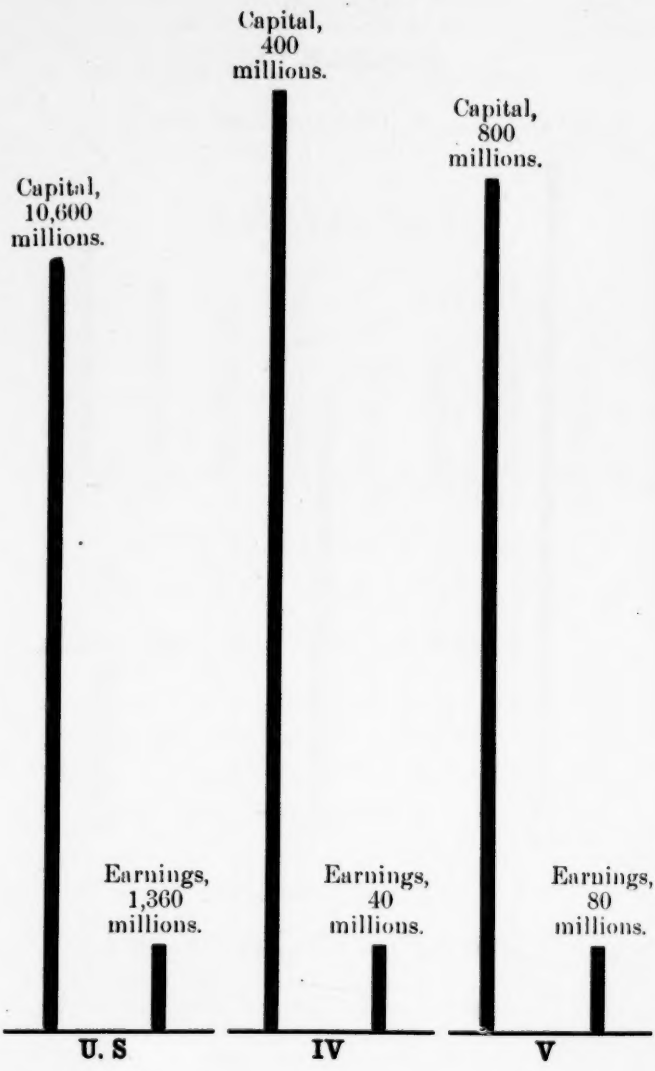
DIAGRAM "I."



CAPITAL COMPARED.

Statistics of Railways, App. Diagram I.

DIAGRAM "J."



CAPITAL COMPARED WITH EARNINGS, 1894.

Statistics of Railways, Diagrams I and IV.

VARIOUS INCONSISTENCIES.

At page 77 of his brief counsel for the roads says:

"It is *the fact* of competition, and not *the kind* of competition, that constitutes the substantial dissimilarity in circumstances and conditions."

At page 102 he says:

"I do not contend that the *mere* fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections."

At page 58 of his brief counsel for the roads says:

"All competing lines, however numerous they may be, must accept the lowest rates offered by any one of them, *or all but one of them must abandon the competitive traffic.*" (Italics mine.)

At page 72 of his brief counsel for the roads says:

"If the competition at Charleston be real and such as to affect rates, the appellants must accept those rates *or abandon the competitive traffic.*" (Italics mine.)

At page 80 of his brief counsel for the roads takes an inconsistent position, showing that it is not necessary to abandon all the traffic. He says:

"I submit, however, that it is not necessary to show that a transportation line is capable of carrying *all* the traffic that passes between its termini."

And on page 81 he shows by a quotation from a memorial to Congress—

"That the country has grown so great in population, wealth, and diversified interests that it requires both railroads and rivers to meet the demands of its enormous interchange, and we could not dispense with either."

If the lines, both rail and water, are worked to their full capacity, and there is enough traffic or more than enough for all the lines, necessarily they will not have to abandon any, and the tendency will be to maintain or advance rates.

There is a great truth contained in this quotation from the memorial, and it completely contradicts and destroys the contention of the roads as to the necessity of abandoning traffic and going into bankruptcy.

It is said that Commodore Vanderbilt perceived this truth when he interested himself in railroads running along the Hudson, and in answer to some of his less far-seeing friends who took the false and narrow view that he was about to destroy by competition his interests in the boats on the river, said that there would in time be more traffic than either the railroads or the river could handle.

The statistics given by counsel for the roads at page 81 of his brief as to the increase of export grain at New Orleans from 500,000 to 18,000,000 bushels per year, since the construction of the jetties, is an excellent illustration of the benefits to railways that accrue from improvement of waterways, for the railroads handled and hauled a very large proportion of this traffic, and have received an immense increase in their business at New Orleans, and will in time carry the imports consisting of high-grade goods that will come to New Orleans, from the fact of ships entering that port in large numbers to take export traffic, bringing with them cargoes, so as not to make the voyage from Europe empty. This is the case at New York now. (See New York Produce Exchange *vs.* B. & O. R. Co., 7 I. C. C. R., 612.)

As was stated at page 35 of appellee's brief, waterways are complements and aids to railways when they are improved sufficiently to meet the demands of modern commerce.

FALLACY OF ALLEGED ERRORS IN OPINION OF CIRCUIT COURT OF APPEALS. RAIL LINES ACTUALLY DO "PERFORM THE SERVICE" BETWEEN CHICAGO AND NEW YORK IN WINTER.

At page 80 of his brief counsel for the roads gives a diagram showing the water line from Chicago and New York and four rail lines, the New York Central, the Erie, the Pennsylvania, and the Baltimore and Ohio running between the same points.

He attributes to the Circuit Court of Appeals error in holding that "competition of one transportation line cannot "be said to meet that of another for the crrriage of traffic "from any particular locality, unless one line could perform "the service if the other did not," and he seeks to prove his assertion by the above-mentioned diagram.

Unfortunately for the position of the roads on this point, the very illustration they give proves beyond doubt the correctness of the ruling of the Court of Appeals.

For it is a fact that when the lakes are closed by ice for six months in the year these lines not only can, but actually do "perform the service" and carry the traffic between Chicago and New York.

And when the lakes are open the water carriers, either through the Erie canal or by a transfer at Niagara falls and thence through the St. Lawrence and by ocean to New York, could "perform the service" if the rail lines did not.

Hence the effect on rates is immediate, direct, and prox-

imate, and, as a matter of fact, it acts instantaneously the moment the season for navigation opens on the lakes. Rates then go down, and when the lakes are closed they go up.

At page 82 of his brief counsel for the roads attributes another error to the Court of Appeals and draws a fallacious diagram.

In this he assumes that "It is quite evident that a line "which runs only between Boston and Chicago cannot carry "traffic between Chicago and New York."

He then proffers another hypothetical case as to Philadelphia and another as to Baltimore.

As a matter of fact, all these cities are connected with New York by rail lines and by water lines, and traffic reaching any of these cities, either Baltimore, Philadelphia, or Boston, can be taken to New York from those points by rail or ocean. As a matter of fact, millions of tons of freight originating at Chicago reach New York city via Philadelphia, Boston, and Baltimore.

The shortest line to New York from Chicago is via the Pennsylvania road, 912 miles.

It is this very fact that traffic originating at Chicago may pass from its point of origin via Boston, Baltimore, or Philadelphia to its point of destination, New York, and actually does so, that creates the competition by which rates to New York from Chicago are regulated.

The Pennsylvania road has not only the shortest line from Chicago to New York, but the shortest line to Baltimore, the distance being 802 miles from the western metropolis to Baltimore; thus, the latter city is 110 miles nearer to Chicago than the city of New York. Philadelphia is 90 miles nearer to Chicago than New York by the Pennsylvania road; hence, an immense amount of traffic reaches New York via these cities. The competition being thus always between the point of shipment and the point of destination, thus, the ruling of the Appeal Court is supported and not weakened by the illustration offered by the roads. The case at bar will be decided on facts, not theories; on realities, not suppositions.

THE DIFFERENTIALS.

At pages 82 and 83 of his brief counsel for the roads, without any apparent pertinence to the subject, brings in the matter of the differentials existing in favor of Baltimore and Philadelphia. These differentials have recently been the subject of a most elaborate examination by the commission *In re* New York Produce Exchange *vs.* Baltimore & Ohio Railroad Company, 7 I. C. C. R., 612.

The history of these differentials before and since they were adopted in 1882, at the recommendation of the distinguished advisory committee, composed of Allen G. Thurman, Elihu B. Washburne, and Thomas M. Cooley, is given, and in a most able report their effect is discussed and considered.

At page 618 the commission says:

"It would seem that the contentions between the carriers "which had given rise to these differentials were mostly "over *export* traffic, and that the differentials were insisted "upon and allowed for the purpose of permitting various "carriers to enjoy a portion of that traffic. The agreement "of April 5, 1877, seems to have been made upon the idea "of equalizing the cost of carriage from various interior "shipping points to foreign ports. It recognized the fact "that ocean freight rates from Baltimore and Philadelphia "to such foreign ports were higher than from New York, "and that inland freights must be correspondingly lower "so that the total freight might be the same."

At page 620: "The purpose of the differential was to "equalize the cost of *exporting grain* and other merchandise "through the various ports to which they were applied."

At pages 623, 624: "The agreement of April 5, 1877, by "which these differentials were originally fixed, recognized "as their justification the fact that ocean freights to Euro-"pean markets were less from New York than from Balti-"more and Philadelphia, and that the inland rates to New "York ought to be correspondingly higher in order to "equalize the through rate."

"It appeared that this *export business* was largely done by "grain brokers. These people do not as a rule own the "grain themselves nor carry stocks from which their orders "are filled. Upon receiving an order they go into the market "and fill it at the least price possible. They sometimes sell "the grain on board the vessel on this side, but ordinarily "it would appear that their price includes *a delivery in* "Europe."

At page 634: "These brokers have no stock in trade. "They have no expensive plant which they must utilize at "a particular point.

"While for the most part they reside in New York, they "can, with almost equal convenience, do business through "any one of the three ports."

At page 659: "The controlling purpose of the differentials "is to distribute between rival railway lines the *export* "*traffic* which moved from the West to the Atlantic sea-"board."

At page 662: "Mr. George R. Blanchard, the commis-

"sioner of that association, stated in his testimony before "the commission the theory upon which these differentials "were fixed. As we understand the testimony upon that "point it was this: A considerable part of the grain in "question is actually shipped from the city of Chicago. Al- "most all of it is purchased upon the basis of the Chicago "market price. Chicago may therefore be treated as the "point of origin. The largest foreign market is Liverpool, "and that, for the purpose of illustration, may be treated as "the point of destination. Now the object of these differ- "entials is to make the cost of transporting this grain from "Chicago to Liverpool the same through all these ports." (Italics mine throughout.)

Now, we respectfully ask, what has all this got to do with the case at bar? What possible bearing has it upon the subject? These differentials relate to "export traffic," international traffic.

Appellee is quite prepared to say there should be international rates for international freight, as this court practically decided in the Import Rate case, 162 U. S., 197. There should also be interstate rates for interstate freight and local rates for local freight.

We have no question of "export traffic" in the case at bar. Mr. Behlmer does not complain because traffic is carried to Liverpool through Charleston for less than he pays.

I can see no relevancy whatever to the case at bar in this subject of differentials. There is no question of competing markets, for Chicago sells and Liverpool buys; the business of Baltimore, New York, and Philadelphia is strictly one of brokerage, and the only competition is between the transportation lines as to who shall do the carrying.

The only relevancy is as to the rates being affected by competition between the point of shipment and the point of destination, Chicago and Liverpool respectively. The rail carriers have agreed to equalize these international rates rather than make war for the traffic.

New York having cheaper ocean rates than the other cities, this advantage is equalized by imposing a differential on New York.

Without further comment we dismiss the subject, remarking, however, that in spite of the fact that the differentials are against New York city, by her superior advantages in concentrated capital, storage capacity of elevators, more numerous and frequent lines to Europe, &c., she attracts three-fourths of the imports and from twenty-five to fifty per cent. of the exports of the entire Atlantic seaboard, showing conclusively that the raising of a rate does not always

deprive a place of its commerce or destroy its railway lines and throw them into bankruptcy by taking away their business. In other words, rates are not the only things considered in commerce, nor are they the only factors that cause goods to move from one point to the other.

So the learned circuit judge in the case at bar was entirely incorrect in following counsel for the roads in supposing that if the rate from Memphis were raised (which no one has asked) no hay at all would come from Memphis, it having been proved that hay in Memphis is from $2 to $5 per ton cheaper than in New York (Trans., p. 78).

PRICES AND SUPPOSITIONS.

At page 83 of his brief counsel for the roads tells us a self-evident truth that whether or not grain or hay will be shipped to Charleston depends on two things, the price and the freight rate. No one can doubt this. Unfortunately for the roads, however, there is not a word in the testimony as to prices from any point except Memphis and New York. No prices are given from Boston, Philadelphia, or Baltimore. The only evidence in the record shows that Memphis has an average of $3.50 per ton in her favor over New York (Trans., p. 78), and that the hay and grain which reaches Charleston whether via New York or elsewhere originates in the West (Trans., p. 63).

After laying down this self-evident proposition which no one has ever doubted or disputed, he goes on to "suppose" that if Boston, New York, Philadelphia, Baltimore, Chicago, and Memphis all sold at the *same price*, the movement would depend on the lowest freight rate. As a general abstract wholly irrelevant proposition this is true. I say general proposition, because it might be that a buyer, wholesale or retail, being able to get credit or some other convenience in any one of the cities mentioned, on that account, would prefer even paying a greater freight rate, or he might like the quality of the article better in one place than the other and prefer paying a greater freight rate on that account.

We venture to suggest nevertheless that however interesting these speculations may be, that it is hardly useful to "*suppose*" prices to be the same and base an argument upon "a *supposition*" which is contradicted by the testimony in the case at bar.

If suppositions are in order, however, appellee begs leave to "suppose" that we consider the case at bar, "suppose" we confine our attention to the facts appearing in the record, "suppose" we discard theories, "suppose" we regard conditions.

OBJECTIONS TO FORM OF COMMISSION'S REPORT CANNOT BE RAISED FOR FIRST TIME ON APPEAL. COURT FORMS ITS OWN JUDGMENT.

At page 92 of his brief my friend cites a passage from the opinion of Judge Clark (73 F. R., 414) to the effect that the report of the commission is not in proper form. At pages 171–179, inclusive, he elaborates this idea.

No such question was made below, and it is raised for the first time here, "in order that errors may be taken advantage of on review, the objections must have been raised in the court below" (*Northern Pac. R. Co. vs. Mores*, 123 U. S., 710).

The decision of Judge Clark has been appealed from, as I am informed, by the commission, and it is worthy of note that he says the Social Circle case does not change his views, and he adheres to the position that the court cannot modify the order of the commission.

In the "Social Circle case" the order of the commission was modified, and the Supreme Court affirmed the judgment of the Circuit Court of Appeals.

In the Import case it was said the court should "either inquire into the facts on its own account, or send the case back to the commission." * * *

This should settle the question. The court will not do a useless thing (*California vs. R. R. Co.*, 149 U. S., 308; 1 Black, 419; 8 Wall., 333; 8 How., 251; 116 U. S., 138; 134 U. S., 547; 141 U. S., 696; 106 U. S., 578). Hence, unless the courts can render a judgment, why should they make any inquiry?

The Brimson case, 154 U. S., 447, conclusively establishes that the court not only may, but must, render its own judgment in matters arising under the interstate commerce act, finally and conclusively determining the issues between the parties.

It was there held that on the application of the commission the functions of the court are not merely ministerial and confined to carrying out the wishes of the commission, but that the court itself is to render final and conclusive judgment.

The application of the commission in that case was under section 12 of the act, invoking the aid of the court in requiring the attendance of a witness. The case came to the Supreme Court on an appeal from a judgment of the court below dismissing the petition. The lower court was reversed. At page 487 this court says: "The proceeding is

" one for determining rights arising out of specified matters " in dispute that concern both the general public and the " individual defendants. It is one in which *a judgment* may " be rendered that will be conclusive upon the parties until " reversed by this court. And *that judgment* may be en- " forced by the process of the Circuit Court. Is it not clear " that there are here parties on each side of a dispute in- " volving grave questions of legal rights, that their re- " spective positions are defined by pleadings, and that the " customary forms of judicial procedure have been pursued. " The performance of the duty, which, according to the con- " tention of the Government, rests upon the defendants, can- " not be directly enforced except by judicial process. One " of the functions of a court is to compel a party to perform " a duty which the law requires at his hands. If it be " adjudged that the defendants are, in law, obliged to do " what they have refused to do, that determination will not " be merely ancillary and advisory, but, in the words of " *Sanborn's case*, will be a 'final and indisputable basis of " 'action,' as between the commission and the defendants, " and will furnish a precedent in all similar cases. It will " be as much a judgment that may be carried into effect by " judicial process as one for money, or for the recovery of " property, or a judgment in mandamus commanding the " performance of an act or duty which the law requires to " be performed, or a judgment prohibiting the doing of " something which the law will not sanction. It is none " the less the judgment of a judicial tribunal dealing with " questions judicial in their nature, and presented in the " customary forms of judical proceedings because its effect " may be to aid an administrative or executive body in the " performance of duties legally imposed upon it by Congress " in execution of a power granted by the Constitution."

And again, at page 489, the court says:

" We are of opinion that a judgment of the Circuit Court " of the United States determining the issues presented by " the petition of the Interstate Commerce Commission, and " by the answers of the appellees, will be a legitimate exer- " tion of judicial authority in a case or controversy to which, " by the Constitution, the judicial power of the United States " extends."

Again, at page 478:

"As the issues are so presented that the judicial power is " capable of acting on them *finally* as between the parties " before the court, etc." (Italics mine.)

Now, when we come to the broad terms of section 16 itself, there seems to be no room left for the slightest quibble that the court is not to render its own judgment, final and con-

clusive, between the parties. By the terms of the statute the "court shall proceed to hear and determine the matter "speedily *as a court of equity*, and without the formal plead- "ings and proceedings applicable to ordinary suits in equity, "but, in such manner, *as to do justice in the premises*, and, to "this end, such court shall have the power, if it think fit, to "direct and prosecute, in such mode and by such persons as "it may appoint, all such inquiries as the court may think "needful to enable it *to form a just judgment* in the matter "of said petition, and, on such hearing, the findings of fact "in the report of said commission shall be *prima facie* evi- "dence of the matters therein stated."

What language could give broader powers or more ample scope for the action of the court "*to do justice in the premises*" and "*to form a just judgment* in the matter of said petition."

It is vested with the fullest power of inquiry and is required to give its own judgment.

Unquestionably a statutory authority is to be strictly followed, but applying that rule here, the court, far from being bound down to the order of the commission, is, by the terms of the act itself, obliged "*to form a just judgment*" of its own, and, in the words of the Brimson case, "a judgment" "that will be conclusive upon the parties until reversed," "the issues are so presented that the judicial power is capable of acting on them *finally*."

To our minds the Supreme Court has indisputably settled the point, and it is established law that the court may modify the order of the commission so "as to do justice in the premises" and "form a just judgment in the matter," "as a court of equity," in the words of the statute.

The Alabama Midland case is also conclusive on the point.

We also call the attention of this court to the fact that we have not availed ourselves of the permissive clause in the section, dispensing with "the formal pleadings and proceedings applicable to ordinary suits in equity," but have filed a regular formal bill in equity, and the judgment in the Circuit Court below was that "the *bill* is dismissed."

In his brief in the Social Circle case filed in the Supreme Court, counsel for the roads says, at page 158:

"The functions of the commission are those of referees or "special commissioners, appointed to make preliminary in- "vestigation of, and report upon, matters for subsequent "judicial examination and determination. In respect to "interstate commerce matters covered by law, the commis- "sion may be regarded as the general referee of each and "every Circuit Court of the United States, upon which the

"jurisdiction is conferred of enforcing the rights, duties and "obligations imposed by the act."

37 Fed. R., p. 613, *K. & I. B. Co. vs. L. & N. R. R.*

The case is heard "*de novo*, upon the pleadings and proofs, "the latter including not only the *prima facie* facts reported "by the commission, but all such other and further testi- "mony as either party may introduce, bearing upon the "matters of controversy."

37 F. R., 614, *K. & I. Bridge Co. vs. L. & N. R. R.*
43 F. R., 43, *I. C. C. vs. B. & O. R. R. Co.*
48 F. R., 177, *I. C. C. vs. L. V. R. R Co.*
50 F. R., 295, *I. C. C. vs. A., T. & S. F. R. R. Co.*
56 F. R., 926, *I. C. C. vs. C. N. A. & T. A. R. R.*
62 F. R., 963, *Shinkle & Co. vs. L. & N. R. R. Co.*

In view of all this we think Judge Clark's opinion of somewhat doubtful authority; but, as we said above, the point, not having been raised below, cannot be considered here.

MILEAGE RATES AND EQUALITY.

It should hardly be necessary to do so after our distinct disavowal made heretofore, but, as a matter of precaution, we now say again that neither appellee nor the commission nor the Circuit Court of Appeals nor anybody else has in this proceeding contended or ordered or urged or demanded that rates be made on a mileage basis, or that distance be regarded as a controlling factor, as appellant charges at page 107 of his brief.

Counsel for the roads seems to think that it is only necessary to assert that a court or the commission or a party takes a particular position never even dreamed of by them, upon which he proceeds to demolish that "supposed" position.

As we remarked before, "suppose" we consider facts and not theories.

Now, counsel for the roads "supposes" at pages 109, 110, 111 of his brief that Judge Severens and the Circuit Court of Appeals in the case at bar meant to contravene the canons of the common law by using the term "equality." Surely he cannot mean to impute that these learned courts contended that rates should be the same all over the country, regardless of the fact as to whether or not the services rendered were similar.

It must be remembered that both Judge Severens and the Circuit Court of Appeals had found as a matter of fact that in the cases before them the circumstances were substantially similar, and it was in relation to those cases that both courts used the term "equality."

Surely counsel for the roads will not impute ignorance to this court in using in the Goodridge case, 149 U. S., 690, the language followed by Judge Goff, to wit:

"The statute recognizes the fact that it is no proper busi-
"ness of a common carrier to foster particular enterprises or
"to build up new industries, but, deriving its franchise from
"the legislature, and depending upon the will of the people
"for its very existence, it is bound to deal fairly with the
"public to extend them reasonable facilities for the trans-
"portation of their persons and property, and to *put all its*
"*patrons upon an absolute equality.*" (Italics mine.)

Surely counsel for the roads will join appellee in "supposing" that Judge Severens and Judge Goff and this court in using the term "equality" at least knew some law, on the proposition as to the common-law requirement of equality of rates for similar services—a proposition never disputed by appellee.

THROUGH ARRANGEMENTS.

At page 137 of his brief counsel for the roads says that the appellants whose roads are west of Augusta are under no obligation to make joint through rates with the S. C. & G. R. R.

In reply we say that question does not arise here, and we plant ourselves firmly on the Social Circle case. At pages 398, 399, 400, 5 I. C. R., and pages 191, 192, 193, 162 U. S., the Supreme Court says:

"Upon this part of the case the conclusion of the Circuit
"Court was that the traffic from Cincinnati to Social Circle,
"in issue as to the Georgia Railroad Company was local,
"and that that company was not, on the facts presented,
"made a party to a joint or common arrangement, such as
"make the traffic to Social Circle subject to the control of
"the Interstate Commerce Commission.

"We are unable to accept this conclusion. It may be
"true that the 'Georgia Railroad Company,' as a corpora-
"tion of the State of Georgia, and whose entire road is within
"that State, may not be legally compelled to submit itself
"to the provisions of the act of Congress, even when carry-
"ing between points in Georgia freight that has been brought
"from another State. It may be that if in the present case,
"the goods of the James & Mayer Buggy Company had
"reached Atlanta, and there and then, for the first time, and
"independently of any existing arrangement with the rail-
"road companies that had transported them thither, the
"Georgia Railroad Company was asked to transport them,
"whether to Augusta or to Social Circle, that company could

"undertake such transportation free from the control of any "supervision except that of the State of Georgia. But when "the Georgia Railroad Company enters into the carriage of "foreign freight, by agreeing to receive the goods by virtue of "foreign through bills of lading, and to participate in through "rates and charges, it thereby becomes a part of a contin- "uous line, not made by a consolidation with the foreign "companies but made by an arrangement for the continuous "carriage or shipment from one State to another, and thus "becomes amenable to the Federal act, in respect to such "interstate commerce. We do not perceive that the Georgia "Railroad Company escaped from the supervision of the "commission, by requesting the foreign companies not to "name or fix any rates for that part of the transportation "which took place in the State of Georgia when the goods "were shipped to local points on its road. It still left its "arrangement to stand with respect to its terminus at Au- "gusta and to other designated points. Having elected to "enter into the carriage of interstate freights and thus sub- "jected itself to the control of the commission, it would not "be competent for the company to limit that control, in re- "spect to foreign traffic, to certain points on its road and "exclude other points. * * *"

"All we wish to be understood to hold is, that when goods "shipped under a through bill of lading, from a point in "one State to a point in another, and when such goods are "received in transit by a State common carrier, under a con- "ventional division of the charges, such carrier must be "deemed to have subjected its road to an arrangement for a "continuous carriage or shipment within the meaning of the "act to regulate commerce. When we speak of a through "bill of lading we are referring to the usual method in use "by connecting companies, and must not be understood to "imply that a common control, management or arrange- "ment might not be otherwise manifested."

At page 82, Trans., is the through bill of lading from Memphis to Summerville on which Behlmer shipped his goods.

It will be time enough to discuss the question of compulsion when it arises. It is not in this case.

Nevertheless, in passing we may remark that when it does come up much can be said against our friend's position. In the language of the Wabash case "continuous transportation from one end of the country to the other," 118 U. S., 571, is of supreme importance, and in the language of the Supreme Court in the case of *The Daniel Ball*, 10 Wall., 565, "the fact that several different and independent "agencies are employed in transporting the commodity,

" some acting entirely in one State, and some acting through " two or more States, does in no respect affect the character " of the transaction. To the extent in which each agency " acts in that transportation, it is subject to the regulation " of Congress."

The commerce act says the "aggregate" rate shall be reasonable, and in one of the cases quoted by my friend, *The A., T. & S. F. v. D. & N. O. R. R.*, 110 U. S., 680, the court, after holding that they could not force the railroads into a business arrangement and compel stoppage at a junction away from the main depot for a transfer of passengers and freight, or into "a continuous business, or a through line " for passengers or freight, including through tickets, through " bills of lading, through checking of baggage and the " like," goes on to say "when a business connection shall " be established between the Denver and New Orleans Com- " pany and the A., T. & S. F. R. R., at their junction, for the " transportation of persons and property coming from or " going to the Denver and New Orleans different questions " may arise, but so long as the situation of the parties con- " tinues as it is now, we cannot say that, as a matter of law, " the prices charged by the A., T. & S. F. for the transporta- " tion of persons and property coming from or going to the " Denver and New Orleans, must necessarily be the same as " are fixed for the continuous line over the Denver & Rio " Grande" (684).

" Our attention has been called to several cases in the " English courts where the question of reasonable or unrea- " sonable preference by railway companies has been consid- " ered, but they all arose under the railway and canal traffic " act, 1854, 17 and 18 Vic., 31, and furnished but little aid " in the determination of the present case. They are " instructive and of high authority as to what would be " undue or unreasonable preferences among competing cus- " tomers, but none of them relate to the rights of connected " railroads where there is no provision in law for their " operation as continuous lines for business. And here it is " proper to remark in the very act under which these cases " arose it is provided that 'every railway company * * * " 'working railways * * * which form part of a con- " 'tinuous line of railway * * * communication * * * " 'shall afford all due and reasonable facilities for receiving " 'and forwarding by one of such railways * * * all " 'traffic arriving by the other, without any unreasonable " 'delay, and without any * * * preference or advantage, " 'or prejudice or disadvantage * * * and so that no " 'obstruction may be afforded to the public desirous of " 'using such railways * * * as a continuous line of

" 'communication, and so that all reasonable accommodation
" 'may, by means of the railways * * * of the several
" 'companies, be at all times afforded to the public in that
" 'behalf.' If complaint was made of a violation of this pro-
" vision, application could be made to the courts for relief,
" *were there such a statute in Colorado, this case would come*
" *before us in a different aspect.* As it is, we know of no power
" in the judiciary to do what the Parliament of Great Britain
" has done, and what the proper legislative authority ought
" perhaps to do for the relief of the parties in this contro-
" versy." (Italics mine.)

Since then the act to regulate commerce has been passed, and, in section 3, carriers are required to furnish "equal *facilities* for the interchange of traffic between their respective lines." Section 7 makes it unlawful, by any "agreement," "by change of time schedule," "carriage in different cars, or by other means or devices," to prevent "the carriage of freight from being continuous from the place of shipment to the place of destination."

In a recent English case, we find "facilities" in subsection 3 of section 23 includes the charging of the rates above mentioned in subsection 1. A "through rate" is a "facility." Railway and canal traffic act, 1888, s. 25, sect. 23, is really aimed at the charging of through rates.

Argument of Balfour Brown, Q. C.

Barry R'y v. Taff Vale R'y Co., Law Rep. Q. B. Div., 1895, vol. 1, p 134.

Lindley, L. J., page 139 of same case, says:

"Whether the expression in subsection 3, 'facilities, "herein provided for,' includes the granting of facilities at "the rate beforementioned, or whether it is confined to fa-"cilities apart from the rate, is by no means any easy ques-"tion to answer; but I will assume that 'the facilities "herein provided for' does include facilities at the rate be-"foremention ed."

But, as we said at the outset, this interesting question does not arise here.

PROPHECIES WHICH "AGE CANNOT WITHER NOR CUSTOM STALE."

There are in the case at bar, as I presume in every other similar case, the usual prophecies.

At page 166 of his brief counsel for the roads says:

"In other words, if the courts compel carriers in the "Southern territory to accept to all of their stations, rates as

"low as those which competition compels them to accept to "the longer-distance competitive points, the result must be "the universal bankruptcy of the Southern Railway sys- "tem."

The novelty never seems to wear off of these prophecies. In the Social Circle case, at page 140 of his brief filed in this court, counsel for the roads says:

"The towns will decline so soon as the railroads, upon "which their real prosperity depends, shall be bankrupted, "as they certainly will be, if the construction of the com- "mission is to be immediately enforced in the South At- "lantic group of States."

It will be remembered that the Social Circle case would ruin the roads if this court sustained the commission. Strange to say, the inevitable crash has not come yet. Now it is the Behlmer case that is to produce this cataclysm. The Joint Traffic decision was sure to ruin the country and cause the heavens to fall. The sun still shines and the roads still run. Possibly all these matters are to be taken in a Pickwickian sense.

At all events, as there can be no interference whatever with any other than interstate rates, all these prophecies, based upon the idea that local rates are to be affected, are without foundation.

Counsel for the roads went outside of the record in the Circuit Court of Appeals and ascribed to the interstate commerce act certain losses to the roads during the five years next succeeding the year 1888, asserting that these losses amounted to $525,459,587.

Counsel's *post hoc propter hoc* argument does not hold, and he could hardly prove, even if he had attempted it in the trial court, that the Baring failure and the slump in Argentines, and the outflow of gold, and the unloading of "American rails" by the London market, and the great panic, are due to our interstate commerce act.

As Sir Charles Russell said before the Behring Sea Commission, we admire "the courage—I will not say audacity—" of these arguments, used to make a brave front in a bad cause.

This court will not be "frighted from its propriety" by immense figures that have nothing to do with this case. We might swell the loss of the public to billions if we went into the census figures. In the food-product inquiry it appeared that Iowa alone would lose $5,000,000 a year by addition of seven cents in the rate of transportation. Moreover, the roads in the United States do not seem to be exactly starving, for, according to Diagram 4, Statistics of Railways, 1894, they earned—

In 1888	$1,000,000,000
" 1889	1,080,000,000
" 1890	1,180,000,000
" 1891	1,240,000,000
" 1892	1,300,000,000
" 1893	1,360,000,000
Total	$7,160,000,000

These earnings show a steady increase each year, and for the five years mentioned by my friend an increase of $360,000,000 over 1888. Does this not prove that the operation of the law has increased the volume of business and, therefore, the earnings by a wise reduction of rates, and has thus benefited the roads? On the total capital of the United States for 1894 they earned over 11 per cent. according to these figures.

The statement of the Supreme Court, 143 U. S., 343, that "a reduction of rates will increase the amount of business and, therefore, the earnings" seems amply proved by these figures. And it must not be forgotten that these earnings of $1,360,000,000, or over 11 per cent. on the total capital of the United States, were made on a capital including such roads as the Union Pacific, and "it is a part of the public "history of the country, of which the court will take judicial "notice, that for the first $36,000,000 of stock issued this "company received less than two cents on the dollar, and "that the profit of construction represented by outstanding "bonds was $43,929,328.34" (*Ames vs. Union Pac. R. R. Co.*, 62 F. R., 13).

So, if we had been accorded the opportunity of having these issues made below or in the pleadings, we might have been able to disabuse counsel for the roads of some of these ideas.

A SAMPLE SOPHISM.

At page 77 of his brief counsel for the roads says: "The "Hudson River railroad runs up the eastern shore of the "Hudson river, from New York to Albany. The West "Shore railroad runs up the western shore of that river, "from Jersey City to Albany.

"According to the theory of the commission, and the "majority of the Court of Appeals, each road may compete "for traffic against other lines on its own side of the river; "but neither of them can do anything to promote the traffic "upon its own side of the river. In other words, New York "railroads may compete with New York railroads, and

"Jersey City railroads may compete with Jersey City rail-
"roads; but New York railroads must not compete with
"Jersey City railroads."

This is not a new idea, but is precisely the same one that counsel for the roads has been using for years. It appears in all his briefs in the Social Circle case, and it is catchy in appearance, and it imputes "anserous fatuity" to the commission and the Circuit Court of Appeals.

However, it is based as usual on a "supposition" contradicted by the facts.

It supposes that the commission and the courts have made such a ruling. They have not In truth, they have ruled just the reverse.

They have ruled that water competition between the point of shipment and the point of destination is *prima facie* a substantially dissimilar circumstance, *ipso facto* relieving the railroad from the operation of the act. Hence the presence of the Hudson river relieves the roads on one side of the river, and at the same time relieves the roads on the other. The roads on each side are put on equal terms with the river. This necessarily puts them on equal terms with each other. Both the commission and the courts know that things which are equal to the same thing are equal to each other, and they have never made the ruling attributed to them by counsel for the roads.

AVERAGE RECEIPTS PER TON PER MILE.

In one of his briefs in these cases, from which many extracts are used in the case at bar, counsel for the roads attempts to prove that "average receipts per ton per mile" are of no value except to show the proportion of high-class or low-class traffic on a road. He then gives an illustration:

"To demonstrate this fact mathematically, let us assume
"that the tonnage of any given road is equivalent to 2,000,000
"tons carried one mile in each of three consecutive years.
"During the first year, let us assume that one-fourth of the
"tonnage was class 1, and carried at 5 cents per ton; and
"that three-fourths of the tonnage was class A, and carried
"at 1 cent per ton. We have:

"500,000 tons of class 1 at 5 cents	$25,000
"1,500,000 tons of class A at 1 cent	15,000
"Or, 2,000,000 tons at 2 cents	$40,000

"which shows that the 'average receipts per ton per mile'
"were, for the first year, 2 cents.

"During the second year, let us assume that one-half of "the tonnage was class 1, and carried at 5 cents per ton; "and that the other half was class A, and carried at 1 cent "per ton. We have:

"1,000,000 tons of class 1 at 5 cents	$50,000
"1,000,000 tons of class A at 1 cent	10,000
"Or, 2,000,000 tons at 3 cents	$60,000

"which shows that the 'average receipts per ton per mile' "were, for the second year, 3 cents.

"During the third year, let us assume that three-fourths "of the tonnage was class 1, and carried at 5 cents per ton, "and that the remaining one-fourth was class A, and car- "ried at 1 cent per ton. We have:

"1,500,000 tons of class 1 at 5 cents	$75,000
"500,000 tons of class A at 1 cent	5,000
"Or, 2,000,000 tons at 4 cents	$80,000

"which shows that 'the average receipts per ton per mile' "were, for the third year, 4 cents.

"We see that, though the tonnage remained the same, "and though the rates charged on class 1 and class A re- "spectively remained the same during all three of the years, "the 'average receipts per ton per mile' for the third year "was double what it was for the first year; and we see that "it increased precisely as the proportion which the high- "class traffic bears to the low-class traffic increased. But "the demonstration does not throw any light whatever "upon the reasonableness of the rates either on class 1 or "class A."

It will be observed that, besides showing a carriage of high-class goods, the "average receipts" come very near showing the "receipts," as well as the proportion of high-class traffic.

For instance, it will be seen that on the same tonnage: In the first year an "average of 2 cents" produced $40,000; in the second year an "average of 3 cents" produced $60,000; in the third year an "average of 4 cents" produced $80,000.

With the increase of the average rate per ton per mile the total receipts increased, as was quite natural if not inevitable.

Hence the "average receipts per ton per mile" show, amongst other things, the "receipts," as might be expected.

Of course it is unfair to compare an "average" produced by including high-grade goods with the "average" of low-grade goods, for by including the high-grade freight the

"average" is swelled, and it is unjust to compare them. Hence we say in the case at bar, it is unfair to compare the average of *all* classes of freight, as has been done by General Manager Ward (Trans., p. 75), with the average of this low-grade freight, hay and grain.

It is a strong argument against the reasonableness of a charge of 2.1 cents per ton per mile on grain to show that the average earnings on *all* freight, high grade and low, is about 7 mills per ton per mile (Trans., p. 75).

The fallacy of the contention of counsel for the roads that these figures only indicate the *class* of traffic carried is well demonstrated in the fact that under this theory the S. C. & G. R. R. must carry high-class traffic, as its "receipts per ton per mile" in this case are 2.1 cents (Trans., p. 82).

At page 74, Trans., however, General Manager Ward testifies that three-fourths of the business of the road is composed of low-grade freight.

As to the illustrations, pages 158, 159, 161, 162 of his brief, given by counsel for the roads, showing that an injustice would be done by making a merchant sell his stock of silks and such articles at the same price he sells his salt and flour, and that it would be wrong to make a merchant do at wholesale prices his retail business, we quite agree with him, and we adopt this illustration as an argument to show that it is wrong for the railroads to sell their wholesale long-distance interstate transportation at retail, local, short-haul *infra*-State prices, and that is what the commission and the Circuit Court of Appeals has decided, and it is what this court decided in the Social Circle case.

And it is what this court decided in Interstate Com. Com. *vs.* B. & O. R'y, 145 U. S., 281, when it held that a party-rate ticket might be sold or wholesale business done at a cheaper rate than that charged for a single ticket or retail business.

In the Party Rate case, 145 U. S., at page 281, Mr. Justice Brown said:

"To bring the present case within the words of this sec-
"tion, we assume that the transportation of ten persons on
"a single ticket is substantially identical with the transpor-
"tation of one, and, in view of *the universally accepted fact*
"*that a man may buy, contract, or manufacture on a large*
"*scale cheaper proportionately than upon a small scale*, this is impossible." (Italics mine.) It is therefore unreasonable to impose local retail prices on this through interstate traffic from Memphis to Summerville.

Respectfully submitted.

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